

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1929

No. 5030

732

**ROYAL BAKING POWDER COMPANY, A
CORPORATION, APPELLANT,**

vs.

**FEDERAL TRADE COMMISSION AND WILLIAM E.
HUMPHREY, C. W. HUNT, ET AL.**

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED AUGUST 19, 1929.

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EDGAR A. McCULLOCH, AND GARLAND S. FER-
GUSON, JR., COMMISSIONERS, APPELLEES.

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COLUMBIA.

INDEX.

	Original	Print
Caption	<i>a</i>	1
Petition for writ of mandamus.....	1	2
Exhibit A.....	15	12
B.....	28	22
C.....	33	26
D.....	44	36
E.....	46	37
F.....	48	39
Rule to show cause; marshal's return.....	50	40
Respondents' amended answer and return.....	51	41
Exhibit A.....	64	50
Petition for writ of prohibition.....	71	60
Writ of prohibition.....	79	67
Marshal's return.....	81	68
Motion to quash writ of prohibition.....	82	69
Motion for prior determination of questions of law.....	84	71
Order sustaining motion-demurrer, discharging rule to show cause, quashing writ of prohibition, and dismissing peti- tion; judgment; appeal noted.....	90	75
Memorandum: \$50 deposited by O'Brien in lieu of bond....	90	76
Designation of record.....	91	76
Additional designation of record.....	92	76
Assignment of errors.....	93	77
Docket entries.....	95	78
Clerk's certificate.....	96	78

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Respondents' amended answer and return.....	51	41
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Writ of prohibition.....	79	67
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Motion to quash writ of prohibition.....	82	69
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Order sustaining motion-demurrer, discharging rule to show cause, quashing writ of prohibition, and dismissing peti- tion: judgment: appeal noted.....	90	75
Memorandum: \$50 deposited by O'Brien in lieu of bond....	90	76
Designation of record.....	91	76
Additional designation of record.....	92	76
Assignment of errors.....	93	77
Docket entries.....	95	78
Clerk's certificate.....	96	78

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ROYAL BAKING POWDER COMPANY, a Corporation, Appellant,
vs.

FEDERAL TRADE COMMISSION and WILLIAM E. HUMPHREY,
C. W. HUNT, et al.

a Supreme Court of the District of Columbia.

No. 75648.

ROYAL BAKING POWDER COMPANY, a Corporation, Petitioner,
vs.

FEDERAL TRADE COMMISSION and WILLIAM E. HUMPHREY,
C. W. Hunt, Abram F. Myers, Edgar A. McCulloch, and
Garland S. Ferguson, Jr., Commissioners, Respondents.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

At Law.

No. 75648.

ROYAL BAKING POWDER COMPANY, a Corporation, 100 East
42nd Street, New York, New York, Petitioner,
vs.

FEDERAL TRADE COMMISSION and WILLIAM E. HUMPHREY,
C. W. Hunt, Abram F. Myers, Edgar A. McCulloch, and
Garland S. Ferguson, Jr., Commissioners, Washington,
D. C., Respondents.

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C. W. Hunt, Abram F. Myers, Edgar A. McCulloch, and
Garland S. Ferguson, Jr., Commissioners, Washington,
D. C., Respondents.

Petition for Writ of Mandamus.

Filed Jun. 30, 1928.

To the Honorable the Justices of the Supreme Court of the District of Columbia:

The petitioner, the Royal Baking Powder Company, respectfully shows that:

1. It is a corporation organized and existing under the laws of the State of New Jersey, having its principal office and place of business at 100 East 42nd Street, New York City, State of New York, and files this petition in its own right.

2. The respondent, Federal Trade Commission, is a Commission created by an Act of Congress approved September 26, 1914 (38 Stat., 717), and therein given certain limited powers, having its principal office in the District of Columbia; the individuals named as respondents are the Commis-

sioners appointed as members of said Federal Trade Commission, holding office under and pursuant to said Act, and residing in the District of Columbia.

3. The petitioner is, and has long been, engaged in the manufacture and sale of baking powder, and particularly a certain brand known as "Royal" baking powder, and in connection therewith owns a valuable business, trade reputation, custom and good-will created by the petitioner and its predecessors in business by care and skill in the selection of materials and throughout the processes of preparation or manufacture of the product, with a view to making it as excellent as it is possible to manufacture, and by large expenditures devoted to acquainting the public with the character and qualities thereof, continuously practiced for more than fifty years.

4. The respondent, said Federal Trade Commission, was created and exists by virtue of the Act of Congress of September 26, 1914 (38 Stat., 717), by which Act, and particularly Section 5 thereof, the powers and jurisdiction of said Commission to interfere with acts of persons, partnerships or corporations are limited to certain proceedings therein defined, consisting, in substance, of issuing and serving a complaint by said Commission stating its charges, giving

the person, partnership or corporation so complained of a right to appear and be heard, reducing the testimony to writing and thus preserving a record upon which findings of fact and an order to cease and desist may be issued, which order is enforceable or reviewable by the courts. The findings of fact which are made by the Federal Trade Commission upon said record are conclusive upon the courts when there is in said record any evidence to support the same, even though in the opinion of the court the preponderance of the evidence may appear to be against the findings of the Commission.

3 5. The respondents have issued against the petitioner a certain complaint alleged to be based on the provisions of Section 5 of said Act of Congress. Said complaint and the proceedings thereunder are known and designated in the records of the Federal Trade Commission as "Docket No. 1499." The said complaint charges, first, that the petitioner is guilty of unfair methods of competition in the dissemination of copies of the Report of the Trial Examiner in a cause known as Docket No. 540, a proceeding by said Commission against the petitioner, together with copies of certain orders of the Federal Trade Commission in said cause and with certain explanatory statements; and, second, that by engaging publicity counsel and furnishing items of news and truthful stories to newspapers the petitioner has committed other acts of unfair competition. The true facts of said publication of the Trial Examiner's Report are matters of record in this court, appearing in the pleadings filed by this petitioner in Law No. 72,173 and Equity No. 47,284. In said proceeding Docket 540, after complaint charging the petitioner with publication of allegedly false statements concerning alum in baking powder, after answer and trial of issues, the proceeding was dismissed by order of the Federal Trade Commission, Commissioner Humphrey dissenting. Thereafter, following publication of the Trial Examiner's Report, the petitioner was ordered to show cause why said proceeding Docket 540 should not be reopened for trial of charges based in part on said publication of said Report. Immediately thereafter by petition for writ of certiorari, or in the alternative for injunction, the proceedings became a matter of record in this court in the cause of Royal Baking Powder Company *vs.* Federal Trade Commission, et al., above cited.

6. On, to wit, the 17th day of May, 1928, the petitioner filed with the Federal Trade Commission a motion to dismiss the complaint in Docket 1499, requesting oral argument thereon. Said motion was based in part on the theory that the allegations of the complaint did not state facts sufficient to constitute a violation of Section 5 of the Federal Trade Commission Act, and recited, among other reasons, that the questions attempted to be raised were a part of the case now pending before the Court of Appeals of the District of Columbia, Royal Baking Powder Company *vs.* Federal Trade Commission, et al., No. 4740.

7. On, to wit, the 31st day of May, 1928, before decision by the Federal Trade Commission on said motion to dismiss its complaint, the petitioner filed in said cause Docket 1499 a petition in the form of an affidavit of prejudice executed by Frederick C. Hitch, Vice-President of the Royal Baking Powder Company, in which it was charged, on reasons and facts therein set forth, that Commissioner William E. Humphrey was so biased and prejudiced against the Royal Baking Powder Company as to be unable to give fair and impartial consideration to matters affecting said Company. In said pleading the petitioner respectfully suggested that said Commissioner would, on consideration of the facts, admit the impropriety of his continuing to sit in judgment in matters concerning this petitioner and prayed that the Commission take proper action to prevent further participation by said Commissioner in deliberations or decisions in matters and proceedings coming before the Commission in which the petitioner was a party or had an interest. A copy of said affidavit is hereto attached, marked Exhibit A and by this reference is incorporated in and prayed to be taken as a part of this petition. The allegations of said affidavit are here reaffirmed and prayed to be taken for consideration by the court and answered by the defendants, and each of them, as if in this paragraph repeated in full.

8. With said affidavit, Exhibit A, the petitioner filed in said Docket 1499 supporting affidavits, executed by Mrs. Harvey W. Wiley and by Mrs. George B. Gillingham. Copy of said affidavit of Mrs. Wiley is hereto attached, marked Exhibit B and by this reference is incorporated herein and prayed to be taken as a part hereof in the same manner and for the same purposes as Exhibit A.

9. In her affidavit Mrs. Gillingham swore that she was on the date thereof the recording secretary of the Housekeepers' Alliance of Washington, D. C., that she attended a meeting of the Alliance on, to wit, the first day of March, 1927, and heard several speeches there made, including the remarks of a male visitor who identified himself as Commissioner Humphrey of the Federal Trade Commission. Said affiant gave an account of the remarks of said Humphrey according to the best of her recollection. This portion of said affidavit is not here repeated but attributes to said Humphrey the same statements as are quoted as the words of said Humphrey in the affidavits of Frederick C. Hitch and Mrs. Harvey W. Wiley (Exhibits A and B). Said affiant further stated that the "remarks of Commissioner Humphrey were not scheduled on the program and were unexpected by the audience. His statements were delivered forcefully, with emphasis and without hesitation."

10. On, to wit, the 4th day of June, 1928, a certain other petition in the form of an affidavit of prejudice executed by said Frederick C. Hitch, was filed with the Federal Trade Commission by the petitioner charging further acts of prejudice and bias against said respondent Humphrey and setting forth in detail certain acts performed by said
6 respondent subsequent to the filing of the affidavits referred to heretofore as Exhibits A and B. A copy of said supplemental affidavit is hereto attached, marked Exhibit C, and by this reference is incorporated herein and prayed to be taken as a part hereof. The statements of said Exhibit C are here reaffirmed and prayed to be taken for consideration by the court and answered by the respondents, and each of them, as if in this paragraph repeated in full.

11. The petitioner is informed and believes and so avers that no denial of the allegations of said affidavits or any of them has ever been made.

12. On, to wit, the 11th day of June, 1928, subsequent to the filing of said pleadings charging Commissioner Humphrey with prejudice and prior to the announcement of any decision on the prayers of said pleadings, the Federal Trade Commission issued a certain order, denying certain of the prayers of the petitioner's motion to dismiss the complaint in Docket 1499. A copy of said order is hereto attached,

marked Exhibit D, and by this reference is incorporated herein and prayed to be taken as a part hereof.

13. From the statements on the face of said order it appears that Commissioner Humphrey was present and voting at the sessions of the Commission on June 8th and 11th, 1928, at which the respondents determined to issue said order.

14. On, to wit, the 19th day of June, 1928, the petitioner filed in Docket 1499 a certain other motion in which it prayed for decision by the Federal Trade Commission on the prayers of the petitions theretofore filed, and hereto attached as Exhibits A and C. Said motion further prayed that the said order denying the motion to dismiss the complaint be vacated, after decision on the question of prejudice, and that further hearing thereon be granted. Copy of said motion is hereto attached, marked Exhibit E and
7 by this reference is incorporated herein and prayed to be taken as a part hereof.

15. On, to wit, the 26th day of June, 1928, the respondents issued a certain other order in said cause Docket 1499. A copy of said order is hereto attached, marked Exhibit F and by this reference is incorporated in and prayed to be taken as a part of this petition. Said order on its face recites and shows that Commissioner Humphrey was present and participated in said decision.

16. The respondents in said order, without making direct reference to the first prayer of the petitioner's motion of June 19th, 1928 (Exhibit E), in which decision on the uncontroverted charges of prejudice was requested, overruled the second prayer of said motion for reconsideration of the motion to dismiss after decision on the matter of prejudice of Commissioner Humphrey. The respondents in said order further took notice of the affidavit and supplemental affidavit of prejudice (Exhibits A and C) and, after reciting that the respondents were fully advised concerning said undenied charges and had fully considered the same, provided that consideration of said questions of prejudice be postponed until final hearing of the case. From said recitals in said order to the effect that the respondents are fully advised and have fully considered each of said affidavits containing undenied allegations of prejudice on the part of Commissioner Humphrey, the petitioner

is informed and believes and so avers that nothing remains to be done by the respondents except the purely formal steps of announcing the decision or of taking a vote and thereafter announcing decision.

17. Postponement by said Commission of its decision or announcement of decision upon said matter of prejudice until final hearing in said Docket 1499 denies proper relief to this petitioner. A decision after final hearing that Commissioner Humphrey is and has been prejudiced and
8 is therefore then disqualified will deny to this petitioner a fair and impartial consideration by a completely unprejudiced Commission of matters already presented or to be presented during the progress of said proceeding up to and including said final hearing. Such decision at said time will not remedy injuries to the petitioner by reason of decisions made theretofore by the respondents in consultation with said prejudiced member.

18. Under the terms of said order a commissioner standing under allegations of prejudice will participate in determination of all questions arising prior to and at final hearing. Said commissioner, without denial of his prejudice and bias, will vote on questions arising on further motions relating to the sufficiency of the complaint and to other matters involving substantial rights of this petitioner, which motions the petitioner intends to file.

19. In the usual course of hearings before the Federal Trade Commission frequent questions are presented to the Commission for decision, such as motions to dismiss at close of Commission's case, motions to admit evidence, motions to exclude evidence, motions for continuance, motions for leave to take depositions, motions for subpoenas duces tecum, et cetera. The petitioner, on its present information concerning Docket 1499, believes and so avers that most, if not all, of said types of motion will be presented to the Federal Trade Commission for decision prior to the final hearing in said cause.

20. The substantial effect of the said order of the Commission (Exhibit F) is to refuse to render decision on the uncontroverted charges of prejudice in said affidavits contained and the prayers based thereon. For all practical

purposes of defense against the complaint the petitioner is denied its right to decision on a grave question properly raised and thrice presented.

21. By said refusal to pass at this time upon the question presented by said affidavits of prejudice and by refusal now to decide or announce decision upon the prayers thereof, the respondents, in denial of petitioner's rights, will compel it to assume great burdens and to make great expenditures of time and money which should not be required until the petitioner is afforded fair consideration and just decision by impartial commissioners on the legal sufficiency of any and all proceedings against it now pending or in future contemplated.

22. The said refusal of the respondents to render decision promptly on the prayers of the petitions charging prejudice is also a denial of petitioner's right to fair and impartial consideration in matters other than those contained in Docket 1499.

23. Although the rules and policy of the Federal Trade Commission prohibit the publication of information concerning applications to the Commission for the issuance of complaints under Section 5 of the Federal Trade Commission Act and hold such matters as strictly confidential until the issuance and service of the formal complaint of the Federal Trade Commission, nevertheless the said William E. Humphrey following the filing of the first affidavit of prejudice made public announcement to representatives of the press informing them and the public generally that there is pending before the Federal Trade Commission an application for another complaint against this petitioner. Said statement by said Humphrey appears in Exhibit C to this petition, being contained in Exhibit 3 thereto.

24. The fact that such an application for another complaint is now pending has been acknowledged by the Federal Trade Commission in correspondence with counsel for the petitioner, but further information concerning the details and nature thereof, although requested, has not been communicated to the petitioner.

25. Being informed through newspapers of said announcement by said Humphrey the petitioner filed said supplemental affidavit of prejudice (Exhibit C) and prayed

that proper action be taken by the Federal Trade Commission to the end that said William E. Humphrey should no longer participate in the further deliberations and decisions in matters and proceedings before said Commission in which this petitioner is a party or has an interest.

26. Under the order (Exhibit F) issued by respondents which purports to postpone consideration of said affidavits and the prayers thereof, the said William E. Humphrey will be permitted to participate in deliberations and decisions on said application for an additional complaint so far as the same may come before the respondents prior to final hearing in said Docket 1499. Without denial of the allegations of the affidavits of prejudice and without decision on the prayers for relief, the respondents, by neglecting and refusing to perform their duties in the premises, will permit said Humphrey to vote on matters affecting this petitioner, particularly on the question of the issuance of an additional formal complaint or complaints, and will permit said Humphrey to discuss said matters in sessions of the Federal Trade Commission with the result that through his bias and prejudice the Federal Trade Commission will take action affecting the petitioner without completely impartial consideration.

27. Issuance of another complaint, as now threatened, will result in great injury to the petitioner's trade and business, and will be an invasion of petitioner's right to fair and impartial consideration in that it would constitute a decision on said application by a commission in which
11 a member participates against whom undenied and
undecided charges of prejudice, bias and positive
antagonism are pending.

28. So far as said Order of the Federal Trade Commission, issued on the 26th day of June, 1928, postpones, until final hearing in Docket 1499, consideration of the petitioner's prayers for relief by disqualification of said Humphrey from participation in actions of the Federal Trade Commission on matters other than questions arising in Docket 1499, it is an attempted evasion of the petitioner's right to decision on questions properly raised and presented. So far as it relates to the application for an additional complaint, it is an attempt to postpone decision until the questions may become moot and so denies the petitioner's rights to orderly procedure.

29. The proceedings on said application for another complaint are in the stage of investigation and will receive no proper public notice or docket number until complaint is issued. The petitioner has no means of filing pleadings in a proposed cause and can only file pleadings in the pending cause, Docket 1499, with prayers for general relief. Unless decision is promptly granted on the pleadings filed in Docket 1499 the petitioner has no relief against the injuries which may be caused by the prejudice and antagonism of Commissioner Humphrey.

30. Under the orders of the respondents the petitioner must file its further pleadings in said cause Docket 1499 on or before the 9th day of July, 1928. All future pleas and answers of the petitioner will be considered and passed upon at sessions of the Federal Trade Commission in which said prejudiced Commissioner will participate.

31. The refusal or neglect to pass upon and decide promptly the questions of prejudice raised in pleadings of the petitioner in Docket 1499 will deny the petitioner's right to orderly procedure and may result in findings of fact in said cause which will be determined in part by a commissioner who has shown bias, prejudice and positive antagonism to this petitioner. In any appeal from respondents' decision upon the issues in Docket 1499 respondents' findings as to the facts will be conclusive against the petitioner if supported by any evidence.

32. In postponing decision or announcement of decision on said questions of prejudice, after admitting that full consideration has been given to the petitioner's pleadings and prayers for relief, the respondents are refusing arbitrarily and unlawfully to do the only remaining act required of them, namely, to give the petitioner the final expression of their judgment. Said refusal to perform duties required by law is without excuse and is announced as intended to continue for an indefinite period of time, probably for years, since the original proceeding in which was rendered the Trial Examiner's Report to which certain of the charges in Docket 1499 refer was pending before the Federal Trade Commission from January, 1920, until dismissed in March, 1926.

33. The respondents by said Order of June 26, 1928 (Exhibit F), have announced their arbitrary refusal to

render decision on matters properly presented to them and without just legal cause, or the assignment of any cause whatsoever, have unlawfully refused to perform their duties.

Wherefore, these premises considered, the petitioner respectfully prays that:

1. A rule issue from this court requiring the respondents, and each of them, to show cause, within such time as the court may deem proper, why a Writ of Mandamus should not issue against them, and each of them, requiring them, before any other or further action is taken by them
13 in the matter of the Royal Baking Powder Company, Federal Trade Commission Docket No. 1499, or in any other matter in which the said Company is a party or has an interest, to pass upon and announce decision on the prayers of certain petitions in the form of affidavits of prejudice against Commissioner William E. Humphrey filed in said cause, Docket No. 1499, on behalf of the petitioner on, to wit, the 31st day of May, 1928, and on, to wit, the 4th day of June, 1928;

2. A writ of Mandamus issue from this court requiring the respondents, and each of them, before any other or further action is taken by them in the matter of the Royal Baking Powder Company, Federal Trade Commission Docket No. 1499, or in any other matter in which the said Company is a party or has an interest, to pass upon and announce decision on the prayers of certain petitions in the form of affidavits of prejudice against Commissioner William E. Humphrey filed in said cause Docket No. 1499 on behalf of the petitioner on, to wit, the 31st day of May, 1928, and, on, to wit, the 4th day of June, 1928;

3. The court grant to the petitioner such other and further relief as the exigencies of the case may require.

ROYAL BAKING POWDER
COMPANY,

By FREDERICK C. HITCH.

MATTHEW E. O'BRIEN,

MATTHEW H. O'BRIEN,

Attorneys for Petitioner.

14 STATE OF NEW YORK,
County of New York, ss:

Frederick C. Hitch, being first duly sworn, deposes and says that he is a Vice-President of the Royal Baking Powder Company, a New Jersey corporation, and is duly authorized to sign the foregoing petition on its behalf; that he has read said petition and knows the contents thereof and that the matters therein alleged as facts are true and those alleged upon information and belief he believes to be true. That this petition is filed in good faith and upon the belief that the petitioner has a just and meritorious cause and not for the purpose of delay.

FREDERICK C. HITCH.

Subscribed and sworn to before me this 29th day of June, 1928.

[NOTARIAL SEAL.]

CONRAD GASCHOTT,
Notary Public, Queens County, No. 576.

15 EXHIBIT A.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

Docket No., 1499.

In the Matter of Royal Baking Powder Company.

Affidavit.

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Frederick C. Hitch, being first duly sworn, deposes and says: That he is Vice-President of the Royal Baking Powder Company, a corporation, and is the duly authorized agent of said corporation to make this affidavit on its behalf.

That information has come to the officers and agents of said corporation which so vitally concerns the interests of the corporation and its stockholders as to render it proper

and necessary that these facts be laid before the Commission. The acts and incidents of which the affiant and said corporation are informed and believe, are that Commissioner William E. Humphrey, at present a member of the Federal Trade Commission, is to such an extent prejudiced against the corporation, its officers and agents, as to be unable to give this respondent the benefit of fair and impartial consideration in any matter relating to its trade and business and on this account is disqualified to sit in judgment in any proceedings in which this respondent is a party or has an interest, or to be a participant in deliberations of the Federal Trade Commission in regard thereto. In support of the statement above made the affiant is informed and believes that the said Honorable Commissioner has by public utterances condemned this respondent, has published and declared concerning this respondent derogatory statements unsupported by facts and has publicly announced his decision on matter claimed to be pending and undetermined before the Federal Trade Commission, of which he is a member, in Docket 540 and in the proceeding at bar. That such expressions of condemnation evidenced by direct statements of said Honorable Commissioner, as affiant is informed and believes, indicate a definite attitude to decide against the respondent and renders him unable fairly to accept or consider evidence on relevant issues arising hereunder and in such proceedings under the said Docket 540 as may come before the Commission.

The affiant is further informed and believes that said Commissioner Humphrey has voluntarily sought opportunity to make statements in public fully evidencing the facts above stated. That as a ground among other reasons for the said Honorable Commissioner's prejudice against the respondent is that the respondent has failed to enter into a so-called "trade practice submittal," which the affiant is informed and believes the said Honorable Commissioner has frequently advocated for members of the baking power industry, and because of his prejudice on this point the said Honorable Commissioner has sought opportunity openly to vilify and condemn this respondent before public gatherings, and particularly before a certain

public gathering including housewives and other members
of the community. On this occasion such criticism
17 and condemnation was definitely based on the ground
that the Royal Baking Powder Company had failed
to enter such trade conference and of all the baking powder
companies had been the chief obstacle in the way of the
Federal Trade Commission's efforts to organize such a
conference, implying that failure of the respondent to enter
into such trade practice conference was an injury to the
public welfare.

The affiant and the respondent are informed and advised
that such trade conferences are voluntary associations of
competitors in a given industry and that the respondent is
under no compulsion in law or in ethics to enter such a
conference of baking powder manufacturers, seventy per
cent of which must necessarily be made up of its competi-
tors who are manufacturing alum baking powders, which
is a different type of baking powder than that manufac-
tured by the respondent. The affiant is further informed
and advised that it is not required to participate as a
minority member in such a group or to thereby place itself
in a position where it will be called upon to relinquish
control of its business, or its business methods, to its com-
petitors by vote of such conference. The conditions which
would govern such conference and the results thereof as
they would affect the respondent, the affiant is informed
have been clearly pointed out to the Honorable Commis-
sioner and his failure to state these facts in his public utter-
ance in regard to the respondent has served to create a
false impression in the public mind as to the respondent's
standard of business ethics and general business conduct.
The affiant submits that statements such as those made by
the Honorable Commissioner in reference to the respond-
ent's position on said trade practice conference and other
18 strictures publicly made against the respondent, are
improper, prejudicial and unbecoming in a public
official whose duty requires him to render an im-
partial judgment on issues affecting the respondent coming
before this Commission, and constitute a substantial effort
to force the respondent into an inequitable position and
under duress to abandon its proper legal rights and pro-
tection to which it is entitled.

Further, the affiant is informed and believes that the said Honorable Commissioner has at sundry times permitted himself to consider alleged evidence and matters not of record in proceedings against the respondent and has permitted these extra judicial facts and circumstances to influence and dictate his judgment to the prejudice and injury of the respondent.

In support of the statements above made concerning the public utterances of the said Honorable Commissioner and evidencing the prejudice against the respondent to which reference has heretofore been made, the affiant submits as an incident a certain speech made by the said Honorable Commissioner in the City of Washington, District of Columbia, on or about the first day of March, 1927. In order to truly reflect the relevancy of this incident, it is necessary to present somewhat in detail the attending circumstances.

As the affiant is informed and believes, at about 2.30 o'clock P. M. on said first day of March, 1927, a meeting was held by an organization of that city, known as the Housekeeper's Alliance of Washington, in the Home Economics Building at George Washington University, in conjunction with a class in Home Economics conducted by one Dr. Minna C. Denton, a member of the Faculty of said Washington University; that at said meeting the circumstances hereinafter described took place, and the statements hereinafter set forth were made.

That as affiant is informed and believes the said
19 meeting was called by said Dr. Minna C. Denton, that neither the respondent nor any of its officers or agents was in any way concerned with the calling or holding of this meeting nor did it have any knowledge in regard to the occurrences hereinafter related until they were reported to its subsequent thereto.

The said meeting was in charge of one Mrs. William B. Chamberlin, President of the said Housekeepers' Alliance and the minutes of the said meeting were kept by one Mrs. Harvey W. Wiley, its Secretary. There were present some twenty women, generally members of said organization and its guests. That the said Honorable Commissioner had not been invited to this meeting but that he appeared there accompanied by a stenographer. Without announcing his name or the purpose of his visit,

the said Commissioner Humphrey asked a member present if he might attend the meeting. On receiving an affirmative reply, he seated himself in the rear of the hall and listened to the proceedings. His companion took stenographic notes of the speeches, as your affiant is informed and believes, but did not take down the remarks of the Honorable Commissioner himself. The program of the meeting was in charge of the said Dr. Minna C. Denton.

On a blackboard in the front of the room was written the following:

“Types of Baking Powder.

1. Starch plus soda plus acid tartrate (Royal).
2. Starch plus soda plus acid phosphate (Rumford).
3. Starch plus soda plus alum plus acid phosphate (Calumet, Davis, Bob White, K C).”

The first address was given by Dr. Denton who discussed the so-called “bread trusts.” In this reference was made to the investigation by the Federal Trade Commission of the activities of the Ward Food Products Company and the Continental Baking Company, as well as to the cases conducted by the Department of Justice, and investigation by the United States Senate. The pending status of these cases was discussed and interpreted. The second speaker was one Miss Helen Woodward of Washington, D. C., a student at Washington University, who discussed the topic “Egg White in Baking Powder.” In her remarks, direct reference was made to several baking powder manufacturers, including the Calumet Baking Powder Company, and the deceptive character of the so-called “water glass test” was explained by the speaker, who also gave an account of the result of her experiments in the determination of available carbon dioxide in various baking powders, at different times and in comparison with results obtained by the so-called “water glass test.”

Following this, on remarks suggested by members of the audience, there was a brief discussion of alum baking powders.

Following other speakers, Mrs. Joseph H. Roe, another student of Home Economics, gave a brief outline of the baking powder cases as they had appeared before the Fed-

eral Trade Commission, referring particularly to Docket 868, issued on application of self-rising flour companies against the Calumet Baking Powder Company, and Docket 1127 against the same respondent on the use of the so-called "water glass test," followed by a description of the practice employed by demonstrators and salesmen of that Company, which had been the basis of the charges in this proceedings.

The speaker continued with a reference to Docket 539 before said Commission, with an explanation of the order issued against the Royal Baking Powder Company growing out of the Dr. Price Baking Powder label and trademark.

21 The speaker next referred to the Ryzon case, Docket 237, and the case against the Southern Manufacturing Company, known as Docket 617. Thereafter again she took up the proceeding known as Docket 540 brought by the Commission against the Royal Baking Powder Company, explaining the charges and referring to the expert testimony submitted therein and the disposition of the case made by the Commission in its order of dismissal entered March 23rd, 1926, and its subsequent order made therein on July 7th, 1926. In her address this speaker further referred to the disapproval which the Federal Trade Commission had evinced of the circulation of the report of Trial Examiner Averill, explaining in part that "one of the men in the offices of the Federal Trade Commission seemed to feel that this matter (referring to the report) was confidential until the case is closed."

On the completion by Mrs. Roe of her remarks, and before Mrs. Chamberlin could introduce the next speaker, Commissioner Humphrey arose and after a few preliminary remarks continued with interruptions as indicated as follows (the underscoring in the quoted matter is by the affiant):

"As a member of the Federal Trade Commission I would like to say a few words, if I may be permitted to do so. At first I want to take occasion to compliment Miss Denton on her very fair statement in regard to the bread trusts. *I am especially interested in that matter and in the baking powder controversy.*" She gave a remarkably clear

* In printing, italics have been substituted for underscoring.

and full and fair statement, but is in error about the close of her statement in regard to the case so far as the Continental Baking Company is concerned, that the Department of Justice's case was never pursued against that Company. The fact about it is that I happen to have a copy of the decree with me."

22 Dr. Denton then interrupted by asking: "Will the gentleman please tell us which Commissioner he is?"

The Commissioner answered: "Humphrey," and continued: "This decree is against the Ward Food Products Co., the Ward Baking Co., General Baking Co., Continental Baking Corporation, United Baking Co., etc. The decree is against all of them and is exceedingly broad and enjoins the Continental Co. in this order."

Dr. Denton again interrupted by saying: "It enjoins them from joining with the other companies but does not enjoin them to dissolve individually, does it?"

To which Commissioner Humphrey replied: "It is very broad and very sweeping. The Federal Trade Commission knew all about it and it was submitted to me before it was closed. I was in favor of dismissing it for two reasons. On November 23rd we dismissed the original complaint. That is, the majority did it over my protest and the case was dismissed. Then the Supreme Court decision came out in another case and we had no more power left with us.

"I am very much interested in baking powder and I have read and heard so much about it that I can see it in my dreams. The only thing that I know that is very bad about baking powder is the way the various companies who make it treat each other. They are about as crooked and contemptible an outfit as we have ever had to deal with, and that includes them all. We want to protect the public. The Royal Baking Powder Company has been the chief one in the way. The others have all agreed to come in and combine to settle their difficulties amicably. The Royal will not. I want to say this much about you, as house-

23 *wives, that I do not think any of you need to be uneasy about using baking powder as far as baking is concerned. None of the powders are injurious and all are equally bad. As an illustration, Royal has been the most active, although Calumet has been close on their heels, about accusing each other. Royal was manufacturing and*

selling alum powders at the same time they were saying such terrible things about them."

One of the women in the audience asked: "What was the alum powder they made, what was the name of it?"

Commissioner Humphrey, replying, said: "I don't know the name of it. It was made by a company in Richmond, Va. You can find it in the records. It is all right there.

"Then the Royal also said the phosphate powder was made from the bones of dead horses, and yet they were making and selling Dr. Price's powder, which is a phosphate powder. *You need only concern yourselves about its efficiency. It is not a scientific question anyway.* it is a question that is in the common sense and common knowledge of everyone. Many people can not eat eggs, tomatoes or strawberries, but is that any reason why we should discard them altogether? These baking powder companies have millions of dollars to spend and yet none of them have ever been able to find a single case where the use of alum has been harmful to anyone. *In view of that fact it is not in the realm of expert testimony and anyone, any scientist, who testifies to that fact lays himself open to criticism and it is merely a waste of time.*"

Mrs. Harvey Wiley then said: "Dr. Wiley believes that alum is harmful."

24 Commissioner Humphrey replied: "I have never heard Dr. Wiley say that alum is harmful."

Dr. Denton said: "He said so in this very room last night."

Mrs. Wiley then said: "He has believed it for fifteen years."

Commissioner Humphrey continued: "Alum is in the common sense and not in the scientific sense as it is used in baking powder. There are many different alums. To give you an illustration, suppose two companies selling a certain kind of fats were in controversy. In law swine is cattle. It is held that a hog, in the legal sense belongs to the same class as cattle. If you had a competitor, you could say that he was selling lard made from fat of cattle, which would be true in the legal sense, but would be misleading. *The alum in baking powder is, therefore, a particular kind of alum and not the kind used in a scientific sense.*

"The baking powder business is the worst propaganda and I warn you ladies to watch out. If there are any ways or means of these companies getting hold of you, they will do it. So beware."

Mrs. Chamberlin, presiding, thanked Commissioner Humphrey for talking and said she had no idea that the subject of baking powders would cause so much controversy.

An account of Commissioner Humphrey's address was carried in the public press, as an example of which reference is made to the issue of the Washington Star of March 2nd, 1927.

The affiant respectfully submits that the statements above quoted made by Commissioner Humphrey on the occasion in question evidence a prejudice toward the respondent, disqualifying him from acting in a judicial capacity to pass upon any issues affecting the respondent or in which this respondent has an interest.

The affiant further specifically avers that the statements of the Honorable Commissioner indicate a purpose to seek opportunity to reflect upon the respondent, a pre-judgment on the merits at issue concerning the deleteriousness of alum as an ingredient of baking powder, an arbitrary disinclination to consider scientific and other relevant testimony constituting the record upon which a judgment bearing upon the issues of Docket 540, and the case at bar, should be based, an antagonism based on respondent's reluctance to waive its legal rights and to compromise such rights in a trade conference, a charge of a slanderous character that respondent is one of a group which is "as crooked and contemptible an outfit as we (Federal Trade Commission) have ever had to deal with," a charge of a slanderous nature that respondent is the chief obstacle in the way of efforts made by the Federal Trade Commission in the protection of the public welfare, a determination that no baking powders are injurious or that all are injurious and that all are equally bad and a false statement that this respondent had engaged in the manufacture and sale of alum powders when the true facts and circumstances in regard to the incident to which the Honorable Commissioner referred, are fully a matter of record and were well

known to the Honorable Commissioner, or should have been well known to him had he read the record of the testimony submitted in Docket 540.

In addition the affiant refers to that portion of the Honorable Commissioner's remarks in which he seeks to relieve the manufacturers of baking powder using alum as an ingredient of the burden of the use of the word "alum" and in support of this charge of bias and prejudice of
26 the said Honorable Commissioner against the respondent, respectfully submits that his expressions in this regard be considered in connection with the classification of baking powder by the Federal Trade Commission itself in its findings of fact under Docket 539, and as well in the use of the term "alum" by the Federal Trade Commission in its order issued July 7th, 1926, in Docket 540, from which order no dissent was noted by Commissioner Humphrey.

In support of this averment above made, that the said Honorable Commissioner is prejudiced against the respondent from information not in the record of Docket 540, but in his personal possession, or to which he has access outside of that record, the respondent respectfully refers to the papers and motions filed in Docket 540 and the petition filed by the respondent in proceedings against the Federal Trade Commission in the Supreme Court of the District of Columbia. Particular reference is also made to the arguments of counsel before the Commission in said Docket 540, copies of which have been filed as an exhibit to a motion in said cause. In this connection the affiant in behalf of the respondent respectfully calls the attention of the present members of the Commission to the fact that they are probably unfamiliar with the only argument made prior to the dismissal of Docket 540, namely that of March 3, 1926, and that Commissioner Hunt was not present upon said argument and that all the other Commissioners who were there present have since retired, except Commissioner Humphrey, who alone dissented from the order of dismissal.

The affiant further respectfully submits that on consideration of the facts herein set forth, that Commissioner Humphrey himself will undoubtedly admit the impropriety of his continuing to sit in judgment in matters con-
27 cerning this respondent coming before this Commission.

On behalf of the respondent, therefore, the affiant submits this affidavit with this statement of facts in support of the charges made therein and prays that proper action be taken thereon by the Federal Trade Commission to the end that the Honorable Commissioner, to which reference has been made herein, shall no longer participate in the further deliberations or decisions in matters and proceedings coming before said Commission in which the respondent is a party or has an interest.

FREDERICK C. HITCH.

Subscribed and sworn to before me this 29th day of May, 1928.

CONRAD GASCHOTT,
Notary Public, Queens County, No. 576.

28

EXHIBIT B.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

Docket No., 1499.

In the Matter of ROYAL BAKING POWDER COMPANY.

Affidavit.

CITY OF WASHINGTON,

District of Columbia, ss:

Anna K. Wiley, being first duly sworn, deposes and says that she is a member of the Housekeeper's Alliance of Washington, D. C., and on March 1, 1927, she was recording secretary of that organization, and that she is the wife of Doctor Harvey W. Wiley.

The said Housekeeper's Alliance held a meeting on, to wit, the 1st day of March, 1927, with a class in Home Economics conducted by Dr. Minna C. Denton, of George Washington University. The meeting was in charge of Mrs. William E. Chamberlin, then president of the Housekeeper's Alliance. The minutes of the meeting were kept by this affiant and Dr. Minna C. Denton was in charge of the program.

This affiant was present for the whole of the meeting and heard scheduled reports by Doctor Denton and students under her instruction on topics relating to the so-called "Bread Trusts" and on various points of interest in connection with baking powder. One of the students gave a brief outline of the so-called "Baking Powder cases" before the Federal Trade Commission mentioning, among others, Docket 540 and giving a brief report on the charges, the expert testimony and the orders of the Commission in that case. The student also mentioned the report of the Trial Examiner and gave an account of the status of the case at that time. At the conclusion of the student's remarks and before the presiding officer introduced the next speaker Commissioner William E. Humphrey, who had been seated in the rear of the hall and was the only male visitor present, arose and made a few remarks. Soon after the meeting was over the affiant examined a stenographic report of the meeting and made additional notes. The stenographic report which appeared then to the affiant to be correct and which to the best of her present recollection is a true and accurate account of statements of Commissioner Humphrey and of questions and remarks addressed to him, is of the following tenor, to wit:

"As a member of the Federal Trade Commission I would like to say a few words, if I may be permitted to do so. At first, I want to take occasion to compliment Miss Denton on her very fair statement in regard to the bread trusts. I am especially interested in that matter and in the baking powder controversy. She gave a remarkably clear and full and fair statement, but is in error about the close of her statement in regard to the case so far as the Continental Baking Co. is concerned, that the Department of Justice's case was never pursued against that Company. The fact about it is that I happen to have a copy of the decree with me."

Dr. Denton then interrupted by asking: "Will the gentleman please tell us which Commissioner he is?"

30 The Commissioner answered: "Humphrey," and continued: "This decree is against the Ward Food Products Co., the Ward Baking Co., General Baking Co., Continental Baking Corporation, United Baking Co., etc.

The decree is against all of them and is exceeding broad and enjoins the Continental Co. in this order."

Dr. Denton again interrupted by saying: "It enjoins them from joining with the other companies but does not enjoin them to dissolve individually, does it?"

To which Commissioner Humphrey replied: "It is very broad and very sweeping. The Federal Trade Commission knew all about it and it was submitted to me before it was closed. I was in favor of dismissing it for two reasons. On November 23rd we dismissed the original complaint. That is, the majority did it over my protest and the case was dismissed. Then the Supreme Court decision came out in another case and we had no more power left with us.

"I am very much interested in baking powder and I have read and heard so much about it that I can see it in my dreams. The only thing that I know that is very bad about baking powder is the way the various companies who make it treat each other. They are about as crooked and contemptible an outfit as we have ever had to deal with, and that includes them all. We want to protect the public. The Royal Baking Powder Company has been the chief one in the way. The others have all agreed to come in and combine to settle their difficulties amicably. The Royal will not. I want to say this much about you as housewives, that I do not think any of you need to be uneasy about using baking powder as far as baking is concerned. None of
31 the powders are injurious and all are equally bad.

As an illustration, Royal has been the most active, although Calumet has been close on their heels, about accusing each other. Royal was manufacturing and selling alum powders at the same time they were saying such terrible things about them."

One of the women in the audience asked: "What was the alum powder they made, what was the name of it?"

Commissioner Humphrey, replying, said: "I don't know the name of it. It was made by a company in Richmond, Va. You can find it in the records. It is all right there.

"Then the Royal also said the phosphate powder was made from the bones of dead horses, and yet they were making and selling Dr. Price's powder, which is a phosphate powder. You need not worry about the healthfulness of baking powder. You only need concern yourselves about its efficiency. It is not a scientific question anyway, it is

a question that is in the common sense and common knowledge of everyone. Many people can not eat eggs, tomatoes or strawberries, but is that any reason why we should discard them altogether? These baking powder companies have millions of dollars to spend and yet none of them have ever been able to find a single case where the use of alum has been harmful to anyone. In view of that fact it is not in the realm of expert testimony and anyone, any scientist, who testifies to that fact lays himself open to criticism and it is merely a waste of time."

Mrs. Harvey Wiley then said: "Dr. Wiley believes that alum is harmful."

Commissioner Humphrey replied: "I have never heard Dr. Wiley say that alum is harmful."

32 Dr. Denton said: "He said so in this very room last night."

Mrs. Wiley added: "He has believed it for fifteen years."

Commissioner Humphrey then continued: "Alum is in the common sense and not in the scientific sense as it is used in baking powder. There are many different alums. To give you an illustration, suppose two companies selling a certain kind of fats were in controversy. In law swine is cattle. It is held that a hog, in the legal sense belongs to the same class as cattle. If you had a competitor, you could say that he was selling lard made from fat of cattle, which would be true in the legal sense, but would be misleading. The alum in baking powder, therefore, is a particular kind of alum and not the kind used in a scientific sense."

"The baking powder business is the worst propaganda and I warn you ladies to watch out. If there are any ways or means of these companies getting hold of you, they will do it. So beware."

There were present approximately twenty women. The speech of Commissioner Humphrey was not scheduled on the program and was unexpected. His statements were delivered forcefully and without hesitation.

ANNA K. WILEY.

(MRS. HARVEY W. WILEY.)

Subscribed and sworn to before me this 26th day of May; 1928.

SARAH E. MORRIS,
Notary Public, D. C.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

Docket No., 1499.

In the Matter of ROYAL BAKING POWDER COMPANY.

Supplemental Affidavit.

CITY OF WASHINGTON,

District of Columbia, ss:

Frederick C. Hitch, being first duly sworn, deposes and says that:

He is Vice-President of the Royal Baking Powder Company, a corporation, and is the duly authorized agent of said corporation to make this supplemental affidavit on its behalf.

Information has come to the officers and agents of said company, concerning acts of Commissioner William E. Humphrey subsequent to the filing of the affidavit of prejudice by this affiant with two supporting affidavits on the 31st day of May, 1928. The affiant here presents said information to the Federal Trade Commission and avers that from said information the affiant and the said corporation believe that Commissioner William E. Humphrey has furnished further proof that he is so prejudiced against the corporation, its officers and agents as to be unable to give this respondent the benefit of fair and impartial consideration in any matter relating to its trade and business

34 and on this account is disqualified to sit in judgment in any proceedings in which this respondent is a party or has an interest, or to be a participant in the deliberations of the Federal Trade Commission in regard thereto.

In support of the above statement the affiant avers that he is informed that the said William E. Humphrey has sought to give publication through newspapers of wide circulation to certain false statements concerning this respondent and that certain parts of said statements made by said William E. Humphrey to press representatives have been

published. Typical examples of said publication are hereto attached as Exhibits 1, 2 and 3.

Said exhibits by this reference are incorporated herein and made a part of this affidavit.

The affiant particularly refers to a statement attributed to said William E. Humphrey concerning the affidavit heretofore filed by this affiant by which this affiant is informed and believes said Commissioner Humphrey said:

“The whole purpose of the criticism is to delay and prevent the case against the company from coming to trial.” (Exhibit 2.)

and to a certain other statement attributed to Commissioner Humphrey concerning said affidavit heretofore filed by this affiant in which this affiant believes Commissioner Humphrey said:

“It is just another dilatory move on their part to stall off action.” (Exhibit 1.)

The affiant avers that in the opinion of the respondent said statements are improper and further indicate the prejudice of said Commissioner Humphrey against this respondent for the following reasons:

1. The said statements are voluntary declarations giving improper discussion to a matter now pending before
35 the Federal Trade Commission and still undetermined by said Commission.
2. The said statements are unsupported, unverified and make false charges against the good faith of the respondent and this affiant in filing said affidavit of prejudice.
3. The said statements are derogatory and prejudicial in that there is contained therein an implication that the respondent is not entitled under law to file and secure decision on matters such as set forth in the affidavits heretofore filed herein.
4. The said statements are misleading in implying that any proper proceedings of the Federal Trade Commission would be delayed by reason of Commissioner Humphrey's retirement from this case.
5. The said statements are made in an improper manner, by oral interview to press representatives, and not under

oath or in a paper of dignity equal to that filed by the respondent.

6. The said statements are believed to be calculated and intended to injure the respondent in the eyes of the public.

In the issue of the United States Daily of Washington, D. C., for June 4, 1928, certain other statements are attributed to Commissioner Humphrey in the following manner:

“Mr. Humphrey Replies.

“Replying to the affidavit, Commissioner Humphrey stated orally June 2 that it was a ‘device for stalling and keeping from trial’ proceedings which have been taken by the Federal Trade Commission against the Royal Baking Powder Company. He said the affidavits were ‘without legal reason or intelligence.’

“Commissioner Humphrey declared that the Commission has found against the company in two orders charging it with ‘false and misleading advertising.’ One of these
36 orders has been affirmed by the Supreme Court of the District of Columbia, upon appeal by the company, he said. Similar action resulted in the second series of charges made by the Commission against the company, he continued, the District Supreme Court sending back an order to the Commission to proceed further.

“An application for a third complaint along the same line has been received by the Commission, Mr. Humphrey added. He declared that he ‘never knew of prejudice being charged when a decision is rendered in favor of a defendant.’ He declared also that his statement that other companies were willing to join in a trade practice conference on the baking powder industry was entirely true.

“‘The whole purpose,’ said Mr. Humphrey, ‘is to delay and prevent the case from coming to trial.’ ”

The affiant is informed and believes and so avers that the above quoted statements were made by Commissioner Humphrey and that the purpose was to injure the respondent.

The quoted statements are false, misleading and improper for the following reasons:

1. Said statements are in discussion of and indicate decision on matters pending before the Commission and awaiting formal decision.

2. Said statements falsely imply that on two occasions this respondent has been found guilty by the Commission on charges of unfair practices.

3. Said statements refer to matters outside the present proceeding and falsely represent the effect of the decisions by judges of the Supreme Court of the District of Columbia in another case, in that (a) no judgment of said court has affirmed an order of the Commission finding the respondent guilty of unfair practices; (b) no such order is involved in the case presented to said court and no order of said court has directed the Commission to prosecute this respondent. The members of the Federal Trade Commission who have come into office since said proceeding was instituted in the said court are respectfully referred to the memorandum opinions of Chief Justice Walter I. McCoy and of Justice A. A. Hoehling.

4. Said statements improperly make public information concerning an alleged application for a third complaint with injury to respondent and in violation of the rules of the Commission.

5. Without attempting to present in this case a full discussion of the questions and decisions in other cases, the affiant respectfully refers the Commission to its own records in Docket 540, to its own rules and to the records of the Court of Appeals of the District of Columbia in Appeal No. 4740 from which the falsity and impropriety of said statements of Commissioner Humphrey will readily appear.

The affiant avers that the tenor of the said voluntary remarks indicates an attitude of prejudice and positive antagonism.

On behalf of the respondent the affiant reaffirms the allegations of the affidavit heretofore filed and avers that said affidavit was filed in good faith and for the purpose of securing prompt decision on the merits of the questions therein raised.

In further support of its charges of prejudice on the part of Commissioner Humphrey against this respondent, the respondent through this affiant refers to a certain other statement attributed to Commissioner Humphrey in certain newspapers and appearing in Exhibit 2 hereto attached as follows:

“In his reply to the attempt to exclude the Commissioner from participation in the Trade Commission’s inquiry into alleged unfair methods of competition pursued by the baking powder concern, the Commissioner today declared:

“ ‘I expressed my profound respect for Mrs. Wiley that in this day’s fashion her skirts are sufficiently wide for not only the worthy doctor, but the Royal Baking Powder Co., to hide behind.’ ”

The affiant avers that in the opinion of the respondent said voluntary statement by said Commissioner Humphrey, made for the purpose of publication in newspapers of the country, is improper and further indicates prejudice on the part of said Commissioner against this respondent for the following reasons:

1. It is an attempt to reflect on the veracity and integrity of an affiant by ridicule and sarcasm, but without assuming the responsibilities and burdens of an answer under oath.

2. It is an expression of opinion on a matter now pending before the Federal Trade Commission and still undetermined by said Commission, by falsely implying that this respondent seeks to evade responsibility for its acts.

3. It is an attempt by a species of intimidation of witnesses to hamper this respondent in securing testimony from witnesses necessary to its defense against charges made by the Federal Trade Commission.

4. The said statements are believed by this respondent and this affiant to have been made for no other purpose than to injure this respondent in its trade and business.

On behalf of the Royal Baking Powder Company the affiant reaffirms its faith in the veracity and integrity of the persons whose affidavits have been filed by the respondent and respectfully submits to the Honorable Commission that the charges contained in said affidavits should be answered only in a written statement made under oath and filed with the Commission and that until said affidavits are controverted in documents of equal dignity the statements must stand as unimpeached and confessed.

The respondent prays that the Commission give to the affiants the protection and consideration which is usually accorded to a witness on the stand.

The affiant respectfully submits that the acts herein described furnish competitors of the Royal Baking Powder Company with improper means of competition and therefore prays that this Commission by its proper orders require cessation from these unfair methods of prosecution.

The affiant therefore submits this supplemental affidavit with exhibits and statements of facts in support of the charges heretofore made and on behalf of the respondent respectfully prays that proper action be taken hereon by the Federal Trade Commission, as soon as the convenience of said Commission permits, to the end that the said William E. Humphrey shall no longer participate in the further deliberations or decisions in matters and proceedings coming before said Commission in which this respondent is a party or has an interest.

FREDERICK C. HITCH.

Subscribed and sworn to before me this 4th day of June, 1928.

[NOTARIAL SEAL.]

SARAH E. MORRIS,
Notary Public, D. C.

40

EXHIBIT 1.

Journal of Commerce, New York City, June 2, 1928.

Royal Aims to Oust Humphrey in Baking Powder
Complaints.

Prejudice Against Company Charged in Affidavit Naming
Chairman.

Trade Board Head Sees Aim to Stall Action.

Commission Urged to Demand Official's Withdrawal or
Decide Whether He Sit in Case.

(Bureau of the Journal of Commerce.)

Washington, June 1.—Prejudice against the Royal Baking Powder Co. was today charged to Chairman William

E. Humphrey of the Federal Trade Commission by Frederick C. Hitch, vice-president of the Royal Baking Powder Co.; Mrs. Harvey W. Wiley, secretary of the Housekeepers' Alliance, and Marie B. Dillingham, a member of that organization. Humphrey's alleged prejudice is said to exist to such an extent as to make him "unable to give the benefit of fair and impartial consideration to complaints pending which allege unfair methods of competition by the company."

The affidavit is in the usual form employed in court procedure when charges are presented that a judge sitting upon any particular case is prejudiced against one of the parties to that proceeding. It is approximately of fourteen typewritten pages couched in legal verbiage, and contains a prayer to the commission suggesting that Mr. Humphrey either withdraw from the case or the commission determine whether he should sit in judgment thereon.

The charges are based on statements alleged to have been made by Chairman Humphrey in March, 1927, on the occasion of an address delivered by him before a class in home economics at George Washington University in this city. It develops that Dr. Minna C. Denton, instructor in home economics, assigned some of her students to certain duties, including an investigation of baking powders, their effect in cookery, etc. Humphrey was present on the occasion of the presentation of the several reports that had been called for by Dr. Denton. Mrs. Wiley quoted the commissioner as having attacked the baking powder company, stating that he called Royal "about as crooked and contemptible an outfit as we have ever had to deal with, and that includes them all."

Continuing, Humphrey further was quoted as saying, in reference to attempts made by the commission to protect the public, "that the Royal Baking Powder Co. has been the chief one in the way—the others have all agreed to come in and combine to settle their difficulties amicably; the Royal will not."

Those directly concerned in the matter were rather reticent tonight, the parties to the affidavit declining to comment upon it, and Commissioner Humphrey stating that he would not like to discuss it at this time. He stated that he had read the affidavit, adding that it was of a character

that is frequently presented in cases at court. Beyond the brief statement, "It is just another dilatory move on their part to stall off action." Chairman Humphrey would not indicate what he would do in the matter.

41

EXHIBIT 2.

The Evening Star, Washington, D. C., June 2, 1928.

Humphrey Replies to Formal Attack.

Federal Trade Commissioner Hits Criticism of Baking Powder Firm and Mrs. Wiley.

The attack by an official of the Royal Baking Powder Co., and Mrs. Harvey W. Wiley, wife of the food specialist, against Commissioner William E. Humphrey of the Federal Trade Commission drew from the Commissioner today a sharp retort in which he charged "the whole purpose of the criticism is to delay and prevent the case against the company from coming to trial."

Affidavits filed by Frederick C. Hitch, vice-president of the company; Mrs. Wiley, secretary of the Housekeepers' Alliance, and Mrs. Marie B. Gillingham a member of the alliance, made public yesterday, were in the hands of the commission today and were understood to be under the scrutiny of the chief counsel's office.

Refuses to Discuss Case.

In his reply to the attempt to exclude the commissioner from participation in the Trade Commission's inquiry into alleged unfair methods of competition pursued by the baking powder concern the commissioner today declared:

"I expressed my profound respect for Mrs. Wiley that in this day's fashion her skirts are sufficiently wide for not only the worthy doctor, but the Royal Baking Powder Co., to hide behind." The commissioner would not discuss the present case against the company

Cites Speech in 1927.

The affidavits charging prejudice on the part of the commissioner declared that he had attacked the Royal Baking

Powder Co., in an address March, 1927, before a home economics class in George Washington University here. Mrs. Wiley's affidavit quoted the commissioner as saying the Royal company was "about as crooked and contemptible an outfit as we have ever had to deal with, and that includes them all."

His address, Mrs. Wiley said, continued: "The others have all agreed to come in and combine to settle their difficulties amicably. The Royal will not." The affidavit filed by Hitch said that Humphrey was "disqualified to sit in any proceedings in which the Royal Baking Powder Co. was interested."

Mrs. Gillingham, who also signed the affidavits, declined today to make further comment than was included in her signed statement.

The United States Daily, Washington, D. C., June 4, 1928.

Prejudice in Case on Baking Powder Trade is Charged.

Commissioner Humphrey Replies That Allegations are
Device to Delay Proceedings.

Three affidavits relating to remarks alleged to have been made by the chairman of the Federal Trade Commission, William E. Humphrey, in connection with the Royal Baking Powder cases, have been filed with the Commission. One of them, sworn to by the vice-president of the Royal Baking Powder Company, Frederick C. Hitch, charges that Commissioner Humphrey has shown himself by these remarks to be "prejudiced" against the corporation.

The other two affidavits bear the signatures of Mrs. Harvey Wiley, former recording secretary, and Marie B. Gillingham, secretary of the Housekeepers' Alliance of Washington, D. C. They quote Mr. Humphrey as having made the following remarks while visiting a joint meeting of the Housekeepers' Alliance with a class in home economics of George Washington University on March 1, 1927:

"I am very much interested in baking power and I have read and heard so much about it that I can see it in my dreams. The only thing that I know that is very bad

about baking powder is the way the various companies who make it treat each other. They are about as crooked and contemptible an outfit as we have ever had to deal with, and that includes them all."

"We want to protect the public. The Royal Baking Powder Company has been the chief one in the way. The others have all agreed to come in and combine to settle their difficulties amicably. The Royal will not. I want to say this much to you, as housewives, that I do not think any of you need to be uneasy about using baking powder as far as baking is concerned. None of the powders are injurious and all are equally bad. As an illustration, Royal has been the most active, although Calumet has been close on their heels, about accusing each other. Royal was manufacturing and selling alum powders at about the same time they were saying such bad things about them."

Discussion on Alum.

A discussion by Commissioner Humphrey is then quoted in both Mrs. Wiley's and Mrs. Gillingham's affidavits. Mrs. Wiley is said to have stated that Dr. Wiley believes alum is harmful, and Commissioner Humphrey is quoted as saying that the alum in baking powder is "a particular kind" and not harmful.

"The baking powder business," Mr. Humphrey is further quoted, "is the worst propaganda and I warn you ladies to watch out. If there are any ways or means of these companies getting hold of you, they will do it. So beware." The remarks, the affidavits declare, were not scheduled on the program and were unexpected by the audience. They were made "forcefully, with emphasis and without hesitation," it is stated.

Mr. Hitch's affidavit states that information coming to the Royal Baking Powder Company's officers shows "that Commissioner William E. Humphrey, at present a member of the Federal Trade Commission, is to such an extent prejudiced against the corporation, its officers and agents,

as to be unable to give this respondent the benefit
43 of fair and impartial consideration in any matter relating to its trade and business and on this account is disqualified to sit in judgment in any proceeding in which this respondent is a party or has an interest."

Mr. Humphrey Replies.

Replying to the affidavit Commissioner Humphrey stated orally June 2 that it was a "device for stalling and keeping from trial" proceedings which have been taken by the Federal Trade Commission against the Royal Baking Company. He said the affidavits were "without legal reason or intelligence."

Commissioner Humphrey declared that the Commission has found against the company in two orders charging it with "false and misleading advertising." One of these orders has been affirmed by the Supreme Court of the District of Columbia, upon appeal by the company, he said. Similar action resulted in the second series of charges made by the Commission against the company, he continued, the District Supreme Court sending back an order to the Commission to proceed further.

An application for a third complaint along the same line has been received by the Commission, Mr. Humphrey added. He declared that he "never knew of prejudice being charged when a decision is rendered in favor of a defendant." He declared also that his statement that other companies were willing to join in a trade practice conference on the baking powder industry was entirely true.

"The whole purpose," said Mr. Humphrey, "is to delay and prevent the case from coming to trial."

44

EXHIBIT D.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office, in the City of Washington, D. C., on the 11th day of June, A. D., 1928.

Present: William E. Humphrey, Chairman; Abram F. Myers, Edgar A. McCulloch, Garland S. Ferguson, Jr., C. W. Hunt, Commissioners.

Docket No., 1499.

In the Matter of Royal Baking Powder Company.

Order Overruling Motion to Dismiss Complaint.

The above case coming on for consideration before the Commission on the 8th day of June, 1928, on the certain

pleading filed by respondent on May 17, 1928, and denominated by it as "Motion to Dismiss the Complaint," without brief or argument by Counsel for the Commission, or Counsel for respondent, and the Commission having duly considered said motion and being fully advised in the premises, it is by the Commission ordered as follows:

First. That so much of said motion as asks that a
45 time be fixed for oral argument on said motion, be and the same hereby is, overruled.

Second. That so much of said motion as asks that the complaint in this proceeding be dismissed, be, and the same hereby is, overruled.

Third. That so much of said motion as asks that time be granted to respondent in which to plead over to the complaint and file answer thereto, be, and the same hereby is, granted in part only, to wit: That respondent be, and hereby is, granted until the 9th day of July, 1928, to plead over to the complaint herein and file its answer thereto.

By the Commission:

OTIS B. JOHNSON,
Secretary.

46

EXHIBIT E.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

Docket No., 1499.

In the Matter of ROYAL BAKING POWDER COMPANY.

Motion.

Comes now the Royal Baking Powder Company, respondent herein, without waiving but reserving to itself any and all exceptions which can or may be taken to any irregularity, impropriety or lack of jurisdiction of the Federal Trade Commission in proceedings under the complaint filed herein, or upon the facts therein alleged, and specifically reserving any and all rights which may be claimed, and all defenses which may be made because of defects or irregularities in the issuance of said complaint or appearing on the face of said pleading, and reserving the right hereafter to plead to said complaint in such manner as it may be advised, and, by its counsel, respectfully moves this Honorable Commission—

1. To pass upon and decide the matters presented to this Honorable Commission in two certain petitions in the form of affidavits of prejudice heretofore filed herein by this respondent and to render decision upon the prayers in said pleadings contained.

2. Thereafter to vacate and set aside the order of this Honorable Commission, issued June 11th, 1928, denying the motion of this respondent to dismiss the complaint herein: to grant a hearing on said motion and to permit this respondent to file a brief in support thereof.

3. To grant thirty days time after notice of decision on this motion in which this respondent may plead over to the complaint herein, if further pleading be required.

In support of the above motion the respondent respectfully shows that:

1. On Thursday, May 31, 1928, a certain petition in the form of an affidavit was filed on behalf of the respondent in which it was charged, on reasons therein stated, that Commissioner William E. Humphrey is so prejudiced against this respondent as to be unable to give impartial consideration to matters affecting it, as therein set forth. In said pleading certain prayers for relief were presented on behalf of the respondent and two supporting affidavits were filed.

2. After said affidavits were called to the attention of the Commission, statements in reply thereto were published in newspapers by Commissioner Humphrey and on said statements a further petition in the form of a supplemental affidavit was filed on Monday, June 4, 1928, in which the respondent renewed its prayers for relief.

3. Subsequent to the filing of said pleadings, and prior to the announcement of decision on the prayers therein contained, the order denying the motion to dismiss the complaint was issued on June 11th, 1928, at a session of the Commission at which, as is recited in said order, Commissioner Humphrey was present.

Respectfully submitted,

WILLIAM A. MOORE,
Attorney for Respondent.

MATTHEW E. O'BRIEN,
MATTHEW H. O'BRIEN,
SAMUEL W. FORDYCE,
Of Counsel.

48

EXHIBIT F.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office, in the City of Washington, D. C., on the 26th day of June, A. D., 1928.

Present: William E. Humphrey, Chairman; Abram F. Myers, Edgar A. McCulloch, Garland S. Ferguson, Jr., C. W. Hunt, Commissioners.

Docket No. 1499.

In the Matter of ROYAL BAKING POWDER COMPANY.

Order Postponing Action on Two Certain Motions and Denying One Certain Motion Filed by Respondent.

The above case came on for consideration before the Commission on this, the 22nd day of June, 1928, upon certain motions heretofore filed in this case by respondent, Royal Baking Powder Company, to wit:

1. Affidavits and motion to disqualify Commissioner Humphrey to participate in the further consideration of this case, filed May 31, 1928.

49 2. Supplemental affidavit and motion to disqualify Commissioner Humphrey to participate in the further consideration of this case, filed June 4, 1928.

3. Motion: (1) To vacate and set aside the Commission's order issued June 11, 1928, denying respondent's motion to dismiss the complaint in this case, and (2) to grant additional time to respondent to plead over to the complaint herein and file answer thereto.

And now the Commission having fully considered each of said motions, and being fully advised in the premises as to each of said motions, decides and orders as follows:

It is Ordered that the consideration of said affidavits and motion filed May 31, 1928, be, and the same hereby is, postponed until the final hearing of the case.

It is Further Ordered that the consideration of said supplemental affidavit and motion filed June 4, 1928, be, and

the same hereby is, postponed until the final hearing of the case.

It is Further Ordered that the motion filed June 19, 1928, to vacate the Commission's said order dated June 11, 1928, and to grant additional time to plead over to the complaint herein and file answer thereto, be, and the same hereby is, denied.

It is Further Ordered that this case proceed in regular course.

By the Commission.

OTIS B. JOHNSON,
Secretary.

50

Rule to Show Cause.

Filed June 30, 1928.

* * * * *

This cause coming on to be heard on petition for writ of mandamus against the respondents herein, Federal Trade Commission, William E. Humphrey, C. W. Hunt, Abram F. Myers, Edgar A. McCulloch and Garland S. Ferguson, it is by the Court this 30th day of June, 1928,

Oredered

That the respondents, Federal Trade Commission, William E. Humphrey, C. W. Hunt, Abram F. Myers, Edgar A. McCulloch and Garland S. Ferguson, and each of them, be and they hereby are required to appear before this court on the 12th day of July, 1928, and show cause, if any they have, why a writ of mandamus as prayed in the petition filed herein should not issue.

JENNINGS BAILEY,
Justice.

Marshal's Return.

Served a copy of the within rule on Federal Trade Commission by Otis C. Johnson, Secty., personally, June 30, 1928; Abram F. Myers and Edward A. McCulloch each personally June 30, 1928; Wm. E. Humphrey personally

July 5, 1928; C. W. Hunt and Garland S. Ferguson not to be found July 12, 1928.

EDGAR C. SNYDER,
*U. S. Marshal in and for
the Dist. of Columbia,*
By JAMES MAGRUDER,
Deputy U. S. Marshal.

K.

51 *Respondents' Amended Answer and Return.*

Filed July 25, 1928.

* * * * * * *

To the Honorable the Justices of the Supreme Court of
the District of Columbia:

The amended answer and return of the above-named respondents to the petition of the above-named petitioner filed pursuant to leave of court first had and obtained.

Said respondents now, and at all times hereafter, saving and reserving unto themselves all and all manner of benefits and advantages of exception which may be had and taken to the many errors, uncertainties, imperfections and insufficiencies in the petitioner's petition contained, for answer thereunto, answering, say:

1. They admit the allegations of paragraph 1.

2. They admit the allegations of paragraph 2.

3. Answering the averments of paragraph 3, respondents state that they have no knowledge of the extent and character of the business carried on by the petitioner, or of its advertising and other competitive activities except such as they have gained from the records and files of the Federal Trade Commission in certain proceedings heretofore and now pending against the petitioner before the Federal Trade Commission, said Federal Trade Commission being hereinafter referred to and designated as "the Commission." One such proceedings is a certain complaint issued at a former time against petitioner by the Commission, upon which in due course an order to cease and desist from the unfair methods of competition charged in said complaint, was issued by the Commission and served

52 upon petitioner. Thereafter the petitioner herein filed in the proper Circuit Court of Appeals a petition against the commission asking a decree of that court

vacating such order to cease and desist. In said case in due process said court made and entered its decree affirming said cease and desist order, and in the opinion on which its said decree was based adjudged that petitioner as charged in said complaint, had been making use of "dishonest practices" and "dishonest devices", constituting unfair and unlawful methods of competition in commerce. Said opinion and decree of said court are recorded in the case of Royal Baking Powder Company vs. Federal Trade Commission, 281 Federal Reporter at pages 744 to 753, both inclusive. Said opinion sets forth in detail the misleading and deceptive practices so charged, found and adjudicated, and the same is by reference thereto hereby made a part of this paragraph of answer and return.

The other proceedings last above referred to are the Docket No. 540 and the Docket No. 1499 alleged and referred to in the petition herein in each of which several cases certain alleged unfair methods of competition are charged against the petitioner by the commission, after the Commission, upon investigation, had concluded that the facts so learned by the Commission warranted its belief that petitioner herein was using unfair methods of competition in commerce and that a proceeding by it in that respect would be to the interest of the public. Said two proceedings have not as yet proceeded to findings of fact.

4. Answering the averments of paragraph 4, respondents admit that the commission has so far as relates to the case, Docket 1499, now pending, the certain, specific and limited powers defined in Section 5 of "An Act To create a Federal

53 Trade Commission, to define its powers and duties, and for other purposes", approved September 26,

1914. Under the provisions of said Section 5, as construed by the courts, the findings of fact made by the Commission upon facts in issue are conclusive, if supported by substantial competent evidence, and if the record shows that the respondent has had the benefit of a fair trial; but not otherwise. The courts do not sustain findings based on incompetent or irrelevant evidence; and they make additional findings in case the evidence establishes additional material facts not found by the Commission. In case competent material evidence has been excluded by the Commission, the courts remand the case to the Commission with directions to admit the same; and the courts safeguard the rights of

a respondent to the end that the respondent may have the benefit of a fair trial of the facts at issue.

5. Answering the averments of paragraph 5, respondents state that they admit that the Commission issued against the petitioner a certain complaint in said proceeding, Docket No. 1499, but do not admit the allegations of the petition as to its allegations. A copy of said complaint is attached hereto, marked "Exhibit A" and is by reference thereto hereby made a part of this answer and return.

6. Answering the averments of paragraph 6, respondents say that they admit that petitioner herein filed, as alleged, a certain motion to dismiss the complaint in Docket No. 1499.

7, 8 and 9. Answering the averments of paragraph 7, 8 and 9, respondents admit that petitioner, as alleged in said paragraphs, filed the affidavits of prejudice executed by Frederick C. Hitch, Vice President of the petitioner
54 herein,—Royal Baking Powder Company, and certain affidavits by Mrs. Harvey W. Wiley and Mrs. George B. Gillingham, as set forth in Exhibits A and B filed with the petition herein.

10. Answering the averments of paragraph 10, respondents admit the filing by Petitioner in Docket No. 1499 of a supplemental affidavit of prejudice as shown by Exhibit C filed with the petition herein.

11. Answering the averments of paragraph 11, respondents state that Commissioner Humphrey did not, at the times of the making of the certain statements alleged to have been made by him, speak from notes previously prepared for the purpose, nor did he then or thereafter make memoranda of the statements made by him. He is not able to say with accuracy or certainty just what portion or portions of the allegations as to his alleged statements were actually made by him, but respondents are willing that, for the purposes of this answer and return, it may be taken as true, without proof, that Commissioner Humphrey made statements in substance as so alleged.

12. Answering the averments of paragraph 12, respondents admit that on the 11th day of June, 1928, the Commission made and entered the certain order alleged, as the same appears in Exhibit D filed with the petition herein.

13. Answering the averments of paragraph 13, respondents admit the allegations of said paragraph.

14. Answering the averments of paragraph 14, respondents admit the filing of the motion alleged as the same appears in Exhibit E, filed with the petitioner herein.

15. Answering the averments of paragraph 15, respondents admit the allegations of said paragraph.

55 16. Answering the averments of paragraph 16, respondents repeat the admission made in relation to paragraph 15 of the petition, but deny any other allegations of paragraph 16, the remaining allegations thereof being a mere erroneous construction of the order of the Commission as shown by Exhibit F filed with the petition herein.

Said order, upon its face, shows that the Commission gave consideration to the affidavit of prejudice, the supplemental affidavit of prejudice, and the certain affidavits, filed therewith and in aid thereof, and came to no conclusion thereon; and that, in the exercise of its discretion, the Commission ordered that the consideration of all said affidavits be postponed until the final hearing of the case, this leaving the question of the Commission's action thereon contingent upon the future exercise of the discretion of the Commission in relation thereto, after further consideration thereof, and after the Commission shall hereafter arrive at a conclusion thereon.

17, 18, 19, 20, 21 and 22. Answering the averments of paragraphs 17, 18, 19, 20, 21, and 22, respondents say that the allegations therein contained tender no basis for an issue of fact, but constitute a mistaken statement of law relating to matters merely procedural and not affecting the substantial rights of the petitioner.

23 and 24. Answering the averments of paragraphs 23 and 24, respondents say that under the general practice of the Commission public statements are not made in relation to pending applications on which complaints have not been issued. After the filing of said application, the attorney in charge of Docket 540 at the office of the Commission in the City of Washington, D. C., held a conference
56 with one Archibald Cox, the duly authorized attorney for the petitioner, pursuant to a previous arrangement with William Zeigler, Jr., President of Royal Baking Powder Company, for a conference in aid of an effort to reach a basis for a final disposition of all matters pending against the Royal Baking Powder Company be-

fore the Commission. At said conference, and in aid of its purpose, said attorney in charge related to said attorney Mr. Cox, the facts in relation to said pending application, the ordinary secret status of such application being thus changed to substantially the open status of a pending complaint. The revelation so made to petitioner required that the applicant in said matter be informed that the fact of the pendency of said application and the identity of the applicant therein had been revealed to the petitioner herein. Said application is under investigation and no report has been made thereon.

25. Answering the averments of paragraph 25, respondents admit the filing of the supplemental affidavit set forth in Exhibit C filed with the petition herein.

26, 27, 28, 29 and 30. Answering the averments of paragraphs 26, 27, 28, 29 and 30, respondents say that the allegations thereof tender no basis for an issue of fact, but constitute only a mistaken assertion of law in relation to matters merely procedural and not affecting any right of the petitioner, and also constitute a renewal of petitioner's prior erroneous and unwarranted construction of the order made and issued by the Commission on June 26, 1928.

31. Answering the averments of Paragraph 31 of this petition, respondents deny that they have refused
57 or neglected to decide the questions raised by petitioner's affidavits of prejudice filed in Docket 1499; and aver the fact to be that respondents, exercising the discretion reposed in them by the Federal Trade Commission Act, have postponed consideration and decision on the said questions to a time when they shall have reached a conclusion thereof.

32. Answering the averments of Paragraph 32 of the petition, respondents deny that their order of June 26, 1928, (Ex. F to the petition) is to be construed as an admission that respondents have given full consideration to the petition and affidavits of prejudice filed by petitioner in Docket 1499 and have decided the questions raised therein; and aver that the said order properly construed only shows that respondents, in the exercise of the discretion conferred on them by the Federal Trade Commission Act, have deferred the consideration and decision of the questions raised. Respondents therefore deny that they have arbitrarily refused, or that they have refused at all,

to decide the questions raised by said affidavits. Respondents further deny that they have already decided the questions so raised and that all that remains to be done is to give the petitioner the expression of their opinion.

33. Answering Paragraph 33 of the petition, respondents deny that they have arbitrarily refused, or that they have refused at all, to render a decision upon the questions raised by the affidavits filed by petitioner in Docket 1499.

34. Answering the petition generally, respondents say:

(1) It appears upon the face of the petition herein that petitioner has filed in said case, Docket No. 1499, a certain affidavit of prejudice, a certain supplemental affidavit of prejudice, and certain affidavits in aid thereof; that the Commission has given the same consideration and has not come to any conclusion as to the merits thereof; that, in the due exercise of its discretion, the Commission has postponed the consideration thereof until the final hearing of the cases, leaving the same open to further consideration and such subsequent action thereon as the Commission may, in its sound discretion, deem to be proper.

(2) The statute creating the Commission and defining its powers makes no provision for the filing of an affidavit of prejudice as against a member or members of the Commission or for a method of disqualifying a Commissioner to act in a given case because of prejudice. The Commission, by such research as it has thus far been able to make, has found no statutory or other authority of law for the filing of such affidavits, or for any action thereon by the commission, and knows of no law creating or defining the rights of petitioner in that behalf or the powers and duties of the commission in the premises. The commission has therefore, postponed consideration of said affidavits until the final hearing of the case, to the end that final action may be taken in the light of any additional knowledge of law or fact that may come to the commission.

(3) The mandatory clause of the petition and rule and of the proposed writ herein is so framed as to incorporate and constitute a decree of injunction, enjoining respondents;

1a. From taking any action in the case, Docket No. 540, referred to in the petition.

2a. From taking any action in the case, Docket No. 1499, referred to in the complaint.

59 3a. From issuing a complaint against the petitioner upon the certain application now pending before the commission as alleged in the complaint.

This pending petition is an action at law, filed and docketed as such, and on no facts alleged or that might be alleged, is petitioner entitled to such decree herein; and, is, therefore, entitled to no relief herein.

(4) The mandatory clause of the petition and rule and of the proposed writ herein is so framed as to incorporate and constitute a decree by this court vacating and setting aside the action of the commission, taken in the due exercise of the discretion vested in it by law, in fixing the time for the consideration of the certain affidavits of prejudice referred to in the petition herein. Upon no facts alleged, or that might be alleged, is petitioner entitled to a writ of mandamus for the accomplishment of such purpose or to reverse any decision of the commission; and the petitioner is, therefore, entitled to no writ of mandamus herein.

(5) The mandatory clause of the petition and rule and of the proposed writ herein is so framed as to incorporate and constitute a decree enjoining the commission from taking any action in the case, Docket No. 1499, before it shall rule on the pending affidavits of prejudice, while the petition affirmatively shows that, by the action of the commission already taken, such affidavits may not be taken up for consideration until the final hearing of the case, or unless and until the order of the commission postponing the consideration of the affidavits shall have been set aside by the commission, or shall have been otherwise vacated or set aside.

60 (6) The mandatory clause of the petition and rule and of the proposed writ herein is so framed as to incorporate and constitute a decree enjoining the commission from taking any action in any matter in which the said company, to-wit: the petitioner herein, is a party or has an interest. Under no facts alleged in the petition herein, or that might have been alleged in such petition, is petitioner entitled to have this court issue a writ of mandamus in this case incorporating and constituting such decree of injunction; and, therefore, the petition herein does not state facts sufficient to constitute a cause of

action herein or to entitle petitioner to the issuance of a writ of mandamus in this proceeding.

(7) The petition herein does not allege a refusal by respondents to assume jurisdiction of, consider, or pass upon, the certain affidavits of prejudice referred to in the petition herein and in the mandatory clause of the proposed writ of mandamus herein, or of any of said affidavits; and the petition herein does not, therefore, state facts sufficient to constitute a cause of action or to entitle petitioner to the issuance of a writ of mandamus herein or to any relief in this cause.

(8) The allegations of the petition do not state a case which entitles petitioner to the writ of mandamus as prayed for or to any writ of mandamus.

(9) Any findings of fact the commission might hereafter make and incorporate in its written report in the case, Docket No. 1499, and any order to cease and desist the commission might hereafter make, enter and issue therein, will have no binding force and effect upon the rights of the petitioner, unless and until such findings of fact shall have been
61 accepted and approved by a proper circuit court of appeals upon a petition duly filed therein by the commission to enforce such order to cease and desist, or upon a petition to review such order duly filed by petitioner in such court; and unless and until such court shall affirm such order or modify the same and affirm such order as so modified.

Such court of appeals, upon any such petition, would take original jurisdiction of the case, Docket No. 1499, and of the entire record thereof and would have full original jurisdiction of all questions presented by such record, and full power to decide the same. If it shall appear from the affidavits of prejudice referred to in the petition herein or from any other part or parts of the record in said case that the petitioner has by the commission been denied the benefit of a fair trial of any issue or issues in said case, such court has under the law full jurisdiction, authority and power so to declare and to reject such findings and hold them for naught, and thereupon to vacate any order to cease and desist the commission may have made, entered or issued thereon.

There is no right expressly given by law for the filing of the affidavits of prejudice alleged in the petition herein,

nor is any right, power or duty expressly created by law for action thereon by the commissioners. If petitioner has a right to file such affidavits, and if such affidavits show any impropriety in the continued participation of Commissioner Humphrey in the consideration of, and action by the Commission upon, said case, Docket No. 1499, and if the Commission shall hereafter decide adversely to the petitioner upon said affidavits and permit said Humphrey to continue to act as such in said case, and if the commission shall hereafter make adverse findings of fact
62 in said case against petitioner, and shall thereon make, return, enter and serve upon petitioner an order to cease and desist; then, and in that event, the statute expressly gives to petitioner, a full, adequate and efficient remedy upon the petition of the commission to enforce such order to cease and desist, and also upon the petitioner's petition to review such order in the manner above set forth. Wherefore, the petition herein does not state facts sufficient to constitute a cause of action, or to entitle petitioner to the issuance of a writ of mandamus herein, or to any relief herein.

FEDERAL TRADE COMMISSION,
WILLIAM E. HUMPHREY,

Chairman;

ABRAM F. MYERS,
EDGAR A. McCULLOCH,
GARLAND S. FERGUSON, JR.,
C. W. HUNT,

Commissioners, Defendants,

By ADRIEN F. BUSICK,

Assistant Chief Counsel,

MARTIN A. MORRISON,

(Their Attorneys.)

DISTRICT OF COLUMBIA, ss:

Edgar A. McCulloch, being first duly sworn, on his oath says:

That he is now and has been continuously since the 11th day of February, 1927, a duly appointed and commissioned member of the Federal Trade Commission, one of the defendants in this cause;

That he has read the above and foregoing joint answer and return of the defendants to the petition, and to the rule issued in this cause and avers that all allegations of fact therein are true;

63 That he makes this affidavit for and on behalf of said Federal Trade Commission, of himself and all of the defendants to said petition and rule to show cause in this cause as set forth in the caption of this answer and return.

EDGAR A. McCULLOCH.

Subscribed and sworn to before me, the undersigned, a notary public in and for the District of Columbia, this 21st day of July, 1928.

[SEAL.]

LUTHER H. WARING.

My commission expires on the 8th day of July, 1932.

Receipt of a copy of the within amended answer and return is acknowledged this 25th day of July 1928.

O'BRIEN & O'BRIEN,
Per S. MORRIS.

64 EXHIBIT A.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

Docket No., 1499.

In the Matter of ROYAL BAKING POWDER COMPANY.

Complaint.

Acting in the public interest, pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Royal Baking Powder Company, hereinafter referred to as the respondent, has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of the said Act, and states its charges in that respect as follows:

Paragraph One. Respondent, Royal Baking Powder Com-

pany, is a corporation organized under the laws of the State of New Jersey, with its principal office and place of business in the City of New York, State of New York. It is engaged in the manufacture of baking powder and the sale thereof to purchasers located at various points in States other than the State of New York. It causes its said product, when so sold, to be transported from its said place of business in the City and State of New York, into and through other States of the United States to the said purchasers at their various points of location. In the regular course and conduct of its said business, respondent is in competition with other corporations, partnerships, and individuals who are also engaged in the sale and transportation of baking powder in commerce between the various States of the United States.

Paragraph Two. On the 18th day of May, 1923, the Federal Trade Commission in certain proceedings then pending before it in which said Royal Baking Powder Company was party respondent and which proceedings were by said Commission denominated the Commission's Docket No. 540, issued a supplemental and amended complaint against the Royal Baking Powder Company, respondent herein, charging it with the use of unfair methods of competition in commerce, and setting up various specific statements alleged to have been used by respondent in a campaign against competing products containing sodium aluminum sulphate. Respondent having entered its appearance and filed its answer to the said complaint, hearings were had before Edward M. Averill, a Trial Examiner duly appointed therefore by the Commission, testimony was taken and other evidence adduced in support of the complaint and in opposition thereto, the record comprising 4711 pages of typewritten testimony and 632 exhibits. The taking of testimony was closed by said Trial Examiner on the 2nd day of May, 1925.

65 On the 12th day of November, 1925, the said Trial Examiner, Edward M. Averill, made in writing his report upon the facts, and served copies upon counsel for the respondent and counsel for the Commission. Such a report is not binding upon the Commission, which Commission alone has the power and authority to find facts in proceedings before it. No action was taken by the Commission

adopting or approving said report, so far as the same relates to the question of the wholesomeness or deleteriousness of alum in baking powder. Counsel for the Commission in due course filed exceptions to the Trial Examiner's report in its entirety, stating his reasons.

Thereafter, on March 3, 1926, the Commission heard oral argument in said matter, and on March 23, 1926, without making any findings as to facts, issued its order dismissing the complaint, and, concurrently with the issuance of such order of dismissal, granted the motion of counsel for the Commission for a re-argument, set the time and place therefor, and served notice thereof upon the respondent.

Further oral argument was heard by the Commission on April 5, 1926, and May 6, 1926 and thereafter on July 7, 1926 the Commission issued its order vacating the said order of dismissal of the proceedings and directed the re-opening of the record for the taking of further testimony on certain specified issues.

Paragraph Three. On or about the 5th day of April, 1926, at a hearing before the Federal Trade Commission in this cause at its office in Washington, at which there were present and sitting Commissioners Hunt, Van Fleet, Humphrey and Nugent, and at which hearing the respondent was present by its counsel, Archibald Cox, Esquire, Mathew H. O'Brien, Esquire, Dale D. Drain, Esquire, Paul Reighard, Esquire, and Marvin Farrington, Esquire, Commissioner Van Fleet speaking from the bench stated:

"The Commission, in passing on this case, did not render any decision whether alum baking powder was harmful or not. That point was not argued. All those things we have had to go over again together were not argued. Seemingly they were not thought of enough importance to bring to the attention of the Commission the last time. Consequently we went ahead and decided the case on the one question; whether the Commission could forbid you from saying on your cans that it did not contain alum. It was the opinion of a majority of the Commission that you could not be prohibited from doing that any more than a man making an all wool blanket could be restrained from saying that it contained no shoddy. That is all that was decided."

And at the said hearing further stated from the bench:

“There has been no evidence presented here, as I understand it, that you are continuing them down to date, and the burden is on the Commission to sustain that allegation in the motion. I wanted also to get it clear that the action of the majority of the Commission in dismissing the case was not a decision to the effect that in view of the state of affairs, the dispute about whether alum is deleterious or not, it was not a decision that it is deleterious, and not a decision that you have a right to make all the statements that have been alleged against you simply because we passed upon the one point.”

And that thereupon, and in reply to the above quoted statement, Archibald Cox, Esquire, chief counsel for the respondent, stated: “I assume that the Commission did not decide anything with regard to alum in one way or the other.”

And that Commissioner Van Fleet thereupon replied: “We did not.”

Paragraph Four. That at said hearing on April 5, 1926, in the presence and hearing of the above named Commissioners and counsel for the respondent, the following discussion between the Chairman of the Commission and Commissioner Humphrey and Archibald Cox, chief counsel for the respondent, took place.

Chairman: “Is there anything in this record proving that the unfair practices complained of here have continued since 1922?”

Mr. Cox: “No. The last of these convasser things is November, 1922. I think I am right in stating that most of them were back in 1906 and 1910.”

Commissioner Humphrey: “Is there any evidence the other way, that they have been discontinued or is the record silent on that?”

Mr. Cox: “I think it is silent. The way it was done, we turned over what they wanted and we stipulated that was our advertising and that fairly shows that up to 1914 on several things and that after that substantially all with the exception of ‘no alum, no bitter taste,’ I think it is silent on that.”

Commissioner Humphrey: "And what the Commission would have to do on that point is that they would have to take the evidence and draw their own conclusions as to whether or not it had been discontinued or whether there is a probability of no discontinuance. There is no positive evidence on that question one way or the other."

Paragraph Five. The Federal Trade Commission has never at any time either in said proceeding, Docket 540, or in any other proceeding, decided or found that sodium aluminum sulphate as used in baking powder is deleterious or injurious to health.

Paragraph Six. On or about the 27th day of August, 1926, while said proceeding Docket 540 was pending, respondent with the intention and purpose of injuring its competitors and unlawfully to restrain their trade and prejudice the public against and to induce the public to cease buying and using the baking powders of its said competitors, and instead to buy and use the baking powders of respondent, and for the purpose of prejudicing physicians, biologists, physiologists, chemists, dieticians, teachers, industrial executives, bakers, grocers, home economic experts and leaders of women's organizations, whose opinions and advice are likely to be followed by others, and to prompt them to advise against the purchase and use of baking powders manufactured by said competitors of the respondent, and to encourage and advise the purchase and use of baking powders manufactured by the respondent, published or caused to be published and widely circulated and distributed, a pamphlet containing copies of the said Trial Examiner's report upon the facts, and a "Foreword" compiled by respondent in which "Foreword" it is stated among other things:

"An order of dismissal was issued by the Commission on March 23, 1926, after consideration of this report."

and also that

"It is proper to conclude, therefore, that the Commission considers the evidence on this subject (The deleteriousness of alum baking powder) final and its order may be deemed a refusal to aid in the suppression of the facts as

to the use of alum in baking powders." (Matter in parenthesis not quoted.)

In connection with the publication and distribution of said pamphlet containing said Trial Examiner's report upon the facts, and respondent's said "Foreword," the respondent circulated to newspapers and others a "release" in words and figures as follows, to wit:

"To the Editor:

Because of the widespread interest of the public in the baking powder case your readers may be interested in the accompanying item:

ROYAL BAKING POWDER COMPANY.

New York, ———, ———."

The facts in the report following which the Federal Trade Commission rendered its decision in the recent baking powder case will be made available to the public for the first time tomorrow. The full text of the report of Trial Examiner Edward M. Averill to the Federal Trade Commission will be published by the Royal Baking Powder Company, which has for many years insisted that it was justified in informing the public that its products do not contain alum. The decision of the Federal Trade Commission upheld the Royal Baking Powder Company in this and other respects.

It is understood that health officials in this country and abroad, scientists and women's organizations, are eager to obtain a statement of the facts in the case, which has been followed closely by all interests in pure food and labeling regulations. Some of the greatest scientific authorities in the country were among the 158 witnesses, who included physicians, biologists, physiologists, chemists, dieticians, teachers, home economics experts, industrial executives, bakers, grocers and women's club leaders, who testified before Trial Examiner Averill.

68 The scientific testimony is carefully summarized and reviewed in the report. Considerable evidence centered on the question as to whether manufacturers using alum in their baking powders were endeavoring to

conceal from the public the presence of alum by using its scientific name on labels. The Examiner declared in his findings that alum as it is commonly known, is being used in these baking powders. He also found that the evidence does not prove that the use of baking powders containing alum is harmless and that it 'does prove that there are substantial grounds upon which to predicate an honest opinion that they are harmful.' After this report the proceedings against the Royal Baking Powder Company were dismissed and the decision with respect to alum later confirmed. The Commission has, however, voted to reopen other aspects of the case."

Paragraph Seven. That said pamphlets containing said Examiner's report and said respondent's "Foreword," both with and without said "Release," were widely circulated and distributed by respondent among the public; that the same have the tendency and capacity, and were so intended and purposed by respondent, to mislead and deceive readers thereof and the public and to cause such readers and the public to believe:

(a) That said Examiner's report represents the official finding and conclusions of, and is a decision by the Federal Trade Commission.

(b) That the Federal Trade Commission had officially and as a body approved the methods of competition charged in said supplemental and amended complaint known as Docket No. 540 to have been used by respondent in its attacks upon competing baking powders.

(c) That said order of dismissal of Docket No. 540 entered March 23, 1926, had been based upon the approval by the Federal Trade Commission, officially and as a body, of the methods of competition charged in said supplemental and amended complaint known as Docket No. 540 to have been used by respondent in its attacks upon competing baking powders, and that such order of dismissal of itself constituted an official approval by said Commission of said methods.

(d) That the Federal Trade Commission had officially, and as a body, adopted and approved said Trial Examiner's report filed in said Docket No. 540.

Paragraph Eight. That, in fact, as respondent at all times well knew:

(a) That the Federal Trade Commission had never taken any action, officially or as a body, adopting or approving the report of said Trial Examiner as the official findings or conclusions of, or as a decision by, the Federal Trade Commission.

(b) That the Federal Trade Commission had not officially and as a body approved the methods of competition charged in said supplemental and amended complaint, known as Docket No. 540, to have been used by respondent in its attacks upon competing baking powders.

(c) That the order of dismissal of March 23, 1926 was not based upon the approval by the Federal Trade Commission officially and as a body, of the methods of competition charged in said supplemental and amended
69 complaint known as Docket No. 540 to have been used by the respondent in its attacks upon competing baking powders, and that said order of dismissal did not of itself constitute an official approval of said methods by the Federal Trade Commission.

(d) That the Federal Trade Commission had never officially, or as a body, taken any action adopting or approving the report of the Trial Examiner filed in Docket No. 540.

Paragraph Nine. That the aforesaid acts of the respondent in circulating and distributing said pamphlets containing said "Foreword", both with and without said "Release", tend to cause the public to be prejudiced against and to refrain from the purchase and use of the baking powders of respondent's competitors, thereby also tend to greatly injure said competitors and also tend to unlawfully restrain and restrict their trade and competition, and constitute an unfair method of competition in commerce within the meaning and intent of Section 5 of an Act of Congress entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Paragraph Ten. That in the month of April, 1926, and thereafter, the respondent employed Thomas R. Shipp, Inc. a corporation having its principal office in the City of Washington, D. C., and engaged in the business of acting for pecuniary reward and consideration as the press agent for its various clients; that such Shipp agency acting under and in pursuance of its said employment by the respondent and

the instructions of respondent in that behalf, and with the knowledge and consent of the respondent, did send and furnish to various newspapers throughout the United States articles prepared by said Shipp agency, consisting of and containing comments on baking powders and the ingredients used in baking powders, and alleged interviews with and opinions of various scientists and public officials concerning baking powders and the ingredients thereof, the effect of which articles was derogatory and disparaging to the baking powders manufactured and sold by respondent's competitors and to such competitors themselves. Respondent wholly concealed its connection with and interest in the various methods, devices and agencies through which this practice was carried into effect and caused the expressions, opinions and comments to seem to be the voluntary contributions of disinterested and technically qualified authorities or persons acting in the public interest.

Paragraph Eleven. That said Shipp agency further, in pursuance of its said employment and with the knowledge and consent of the respondent and under its instructions, caused and induced said newspapers to accept the articles so prepared by said Shipp agency and publish the same as items of news, ostensibly received or gathered by such newspapers in the regular course of newspaper work, and without mention of the fact that said articles were prepared by and originated with said Shipp agency, or were in any manner inspired by respondent.

Paragraph Twelve. That the said articles so prepared, distributed and caused to be published by the said Shipp agency, as aforesaid, the respondent's interest in and connection therewith being concealed, as aforesaid, were calculated and intended to mislead the public into the belief that said articles contained the disinterested, unbiased and voluntary expressions and statements of qualified experts and officials acting in the public interest and have the capacity and tendency to prejudice the purchasing
70 public against the purchase and use of baking powders manufactured by respondent's competitors, and thus to injure the business of said competitors.

Paragraph Thirteen. That said publication and distributing by respondent of said articles so prepared by said Shipp agency, containing said derogatory and disparaging

expressions, comments, and alleged interviews, published and distributed by means of said newspapers on an extensive scale and over a wide area of population in the guise of disinterested news items, the respondent's connection therewith, and the interest of the respondent therein being wholly concealed and undisclosed, is to the prejudice and injury of the public and respondent's competitors and constitute an unfair method of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes".

Wherefore, the premises considered, the Federal Trade Commission, on this 7th day of March, A. D., 1928, now here issues this its complaint against the Royal Baking Powder Company, the respondent herein.

Notice.

Notice is hereby given you, Royal Baking Powder Company, respondent herein that the 7th day of May, A. D., 1928, at 10 o'clock in the forenoon is hereby fixed as the time and the offices of the Federal Trade Commission, in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to Cease and Desist from the violation of law charged in this complaint.

You are notified and required within 30 days from service of the complaint unless such time be extended by order of the Commission to file with the Commission an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of Practice adopted by the Commission with respect to answers and failure to answer (Rule III) provide as follows:

(1) In case respondent shall desire to contest the proceeding such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each

of the facts alleged in the complaint unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer unless respondent shall state in the answer that respondent is without knowledge shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding the answer may consist of a statement, that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter and serve upon respondent an order to cease and desist from the violation of the law alleged in the complaint or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In witness whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 7th day of March, A. D., 1928.

By the Commission.

OTIS B. JOHNSON.

Secretary.

Petition for Writ of Prohibition.

Filed February 9, 1929.

* * * * *

To the Honorable the Justices of the Supreme Court of the District of Columbia:

The petitioner, the Royal Baking Powder Company, respectfully shows that:

1. As appears of record herein, the petitioner in its petition for the writ of mandamus heretofore filed against the respondents herein respectfully prayed that:

1). A rule issue from this court requiring the respondents, and each of them, to show cause, within such time as the court may deem proper, why a writ of mandamus should not issue against them, and each of them,
72 requiring them, before any other or further action is taken by them in the matter of the Royal Baking Powder Company, Federal Trade Commission Docket No. 1499, or in any other matter in which the said Company is a party or has an interest, to pass upon and announce decision on the prayers of certain petitions in the form of affidavits of prejudice against Commissioner William E. Humphrey filed in said cause, Docket No. 1499, on behalf of the petitioner on, to wit, the 31st day of May, 1928, and on, to wit, the 4th day of June, 1928:

2). A writ of mandamus issue from this court requiring the respondents, and each of them, before any other or further action is taken by them in the matter of the Royal Baking Powder Company, Federal Trade Commission Docket No. 1499, or in any other matter in which the said Company is a party or has an interest, to pass upon and announce decision on the prayers of certain petitions in the form of affidavits of prejudice against Commissioner William E. Humphrey filed in said cause Docket No. 1499 on behalf of the petitioner on, to wit, the 31st day of May, 1928, and, on, to wit, the 4th day of June, 1928:

3). The court grant to the petitioner such other and further relief as the exigencies of the case may require.

2. As further appears of record herein, after consideration of said petition for writ of mandamus a rule to show cause why such writ should not be granted as prayed in said petition was issued by order of Mr. Justice Jennings Bailey on the 30th day of June, 1928, in the following words and figures, to wit:

73

“Rule to Show Cause.

“This cause coming on to be heard on petition for writ of mandamus against the respondents herein, Federal Trade Commission, William E. Humphrey, C. W. Hunt,

Abram F. Myers, Edgar A. McCulloch and Garland S. Ferguson, it is by the Court this 30th day of June, 1928,

“Ordered:

“That the respondents, Federal Trade Commission, William E. Humphrey, C. W. Hunt, Abram F. Myers, Edgar A. McCulloch and Garland S. Ferguson, and each of them, be and they hereby are required to appear before this court on the 12th day of July, 1928, and show cause, if any they have, why a writ of mandamus as prayed in the petition filed herein should not issue.

“JENNINGS BAILEY,

“Justice.”

3. As further appears of record herein, copies of said rule to show cause were duly served upon the respondents and appearance on their behalf was duly entered in this court by counsel.

4. As further appears of record herein, an answer and return to said petition and said rule to show cause was thereafter filed by respondents which, on motion of the petitioner, was thereafter stricken from the files by order of Mr. Justice Jennings Bailey on, to wit, the 16th day of July, 1928. Thereafter an amended answer and return on behalf of the respondents was filed and a motion by petitioner to strike said amended answer from the files was thereafter filed.

5. Thereafter, on, to wit, the 22nd day of November, 1928, upon oral argument in open court of said motion to strike the amended answer and return of the respondents herein, the respondents by their counsel requested this court to rule whether or not respondents could proceed further in said cause Docket No. 1499 while this cause was still
74 pending and undetermined in this court. This court then and there announced from the bench that it would pass upon said request when this cause should be up for final hearing.

6. Thereafter, on, to wit, the 25th day of January, 1929, respondents by their counsel withdrew their said request and announced to this court their intention to proceed with the trial of said cause Docket No. 1499 with full participation therein by respondent Humphrey, without passing upon and announcing the decision of respondents upon said

questions of the prejudice and disqualification of said Humphrey and notwithstanding the rule to show cause heretofore issued and served upon respondents herein.

7. Thereafter, on, to wit, the 30th day of January, 1929, the respondents issued and served upon this petitioner a certain order in the consideration, adoption, entering and issuance of which order said Humphrey actively participated and which is in words and figures as follows:

“UNITED STATES OF AMERICA:

“Before Federal Trade Commission.

“At a regular session of the Federal Trade Commission, held at its office, in the City of Washington, D. C., on the 30th day of January, A. D., 1929.

“Commissioners: Edgar A. McCulloch, Chairman; Garland S. Ferguson, Jr., C. W. Hunt, William E. Humphrey.

“Docket No., 1499.

“In the Matter of ROYAL BAKING POWDER COMPANY.

“*Order Appointing Examiner and Fixing Time and Place for Taking Testimony.*

“This matter being at issue and ready for the taking of testimony,

“It is ordered that Millard F. Hudson, an examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law.

75 “It is further ordered that the taking of testimony in this proceeding begin on Tuesday, February 12, 1929, at 10:00 o'clock in the forenoon of that day, at Room 2702, Federal Trade Commission Office, 2000 D Street, N. W., Washington, D. C.

“Upon completion of testimony for the Federal Trade Commission, the examiner is directed to proceed immediately to take testimony and evidence on behalf of the re-

spondent. The examiner will then close the case and make his report.

“By the Commission.

(Seal of Federal Trade Commission.)

(Signed)

“OTIS B. JOHNSON.

“OTIS B. JOHNSON,

“*Secretary.*”

8. Prior to the filing of its said petition for the writ of mandamus herein, this petitioner repeatedly prayed the respondents in pleadings filed with the Federal Trade Commission in said Docket No. 1499,

(a) To pass upon and announce decision upon certain petitions in the form of affidavits of prejudice against the respondent Humphrey in said cause Federal Trade Commission Docket No. 1499;

(b) To take such action before considering certain motions of this petitioner attacking the sufficiency of the complaint purporting to state the charges against this petitioner as well as certain other preliminary and important motions in said cause Docket No. 1499.

9. The respondents have repeatedly and persistently denied the said last mentioned prayers of this petitioner and have repeatedly and persistently refused to announce decision upon the question of the prejudice of said Humphrey prior to further proceedings in said cause Docket No. 1499 and have repeatedly and persistently failed to disqualify said Humphrey but have continued to permit said Humphrey to participate in deliberations and decisions of said Federal Trade Commission in said last mentioned cause subsequent to the filing of said affidavits of prejudice.

10. Respondents, by their said announcement on, to wit, the 25th day of January, 1929, and by their said order entered and issued on, to wit, the 30th day of January, 1929, have already taken action and threaten to do other and further acts which would be forbidden if this court should grant the writ of mandamus for which the petitioner has prayed herein.

11. Respondents, notwithstanding the rule to show cause heretofore issued herein, have now proceeded and threaten further proceedings, the effect of which is to render moot all issues involved in the above-entitled cause now pending and undetermined in this court, and are about to render futile and impotent any writ of mandamus or any other relief which this court might hereafter issue on the prayers of the petition for the writ of mandamus herein.

12. The acts and threatened acts of respondents are intended to and will have the effect of denying to this petitioner its rights to a hearing before this court and the benefit of any relief which might be granted by this court on final decision herein. Said acts and threatened acts will permit and cause the continued active participation by said Humphrey as a member of said Federal Trade Commission in deliberations and decisions upon matters affecting this petitioner without announcement of decision on said affidavits of prejudice and without denial of the charges of prejudice contained therein. Respondents will conclude the taking of testimony and will consider and pass upon all interlocutory motions and will complete all proceedings before them in said cause Docket No. 1499 and will, before final decision in the above-entitled cause now pending and undetermined in this court, have performed all acts which this petitioner seeks to have preceded by an announcement of the decision of respondents upon the said question of the prejudice and disqualification of said Humphrey.

13. On, to wit, the 15th day of January, 1929, Abram F. Myers, a party originally named as a respondent in this cause, ceased to be a member of the Federal Trade Commission and no further relief against said Myers is here sought.

Wherefore, these premises considered, the petitioner respectfully prays that—

1. A writ of prohibition issue from this court directed to the respondents, the Federal Trade Commission and William E. Humphrey, C. W. Hunt, Edgar A. McCulloch and Garland S. Ferguson, and each of them, prohibiting them and each of them, and their attorneys, agents, employees and all persons acting under their direction and control,

from taking any other or further action, directly or indirectly, in the cause known as Federal Trade Commission Docket No. 1499, prior to final decision by this court in this cause, and requiring them to maintain said proceeding Docket No. 1499 in the same status as at the time of the service of the rule to show cause why a writ of mandamus should not issue as prayed in the original petition filed herein, and particularly prohibiting them from proceeding with the taking of testimony on, to wit, the 12th day of February, 1929, or at any other time, and from proceeding to issue orders, or do or cause to be done any other
78 act in said Docket No. 1499 until final decision in this cause.

2. The petitioner be granted such other and further relief as the exigencies of the case may require and that the court take such action as may seem just and proper in the premises.

ROYAL BAKING POWDER COMPANY,
By MATTHEW E. O'BRIEN.

MATTHEW E. O'BRIEN,
MATTHEW H. O'BRIEN,
Attorneys for Petitioner.

CITY OF WASHINGTON,
District of Columbia, ss:

Matthew E. O'Brien, being first duly sworn, deposes and says that he is attorney for the Royal Baking Powder Company, a New Jersey corporation, and is duly authorized to sign the foregoing petition on its behalf; that he has read said petition and knows the contents thereof and that the statements of fact therein contained are true.

MATTHEW E. O'BRIEN.

Subscribed and sworn to before me this eighth day of February, A. D. 1929.

[NOTARIAL SEAL.]

SARAH E. MORRIS,
Notary Public, D. C.

79

Writ of Prohibition.

Issued February 9, 1929.

* * * * *

UNITED STATES OF AMERICA, ss:

The President of the United States to the Federal Trade Commission and William E. Humphrey, C. W. Hunt, Edgar A. McCulloch, and Garland S. Ferguson, Jr., respondents in the above-entitled cause, Greeting:

Whereas it has been shown to the Supreme Court of the District of Columbia by the announcements of counsel for the respondents in the above-entitled cause and by the petitions filed herein on behalf of the above-named petitioner that notwithstanding the issuance and service of a rule to show cause why a writ of mandamus should not issue requiring the respondents and each of them before any other or further action is taken by them in the matter of Royal Baking Powder Company, Federal Trade Commission Docket No. 1499, or in any other matter in which said Company is a party or has an interest, to pass upon and announce decision on the prayers of certain petitions in the form of affidavits of prejudice against Commissioner William E. Humphrey filed in said cause Docket No. 1499, on behalf of the petitioner on, to wit, the 31st day of May, 1928, and on, to wit, the 4th day of June, 1928, and notwithstanding that no final decision has been rendered by this court on the prayers of said petition, you have proceeded and are about to proceed to take certain actions in respect to the subject matter of this cause, and are proceeding to take actions to render moot all issues in this cause,

And whereas it appears to this court that no effective relief may be granted on the prayers of the petition
80 for writ of mandamus, if this court should on final decision determine to grant said prayers, unless the status of said cause Docket No. 1499 at the time of the service of the rule to show cause be maintained,

And whereas the respondents have announced to this court their refusal to maintain said status,

And whereas the respondents are proceeding to issue orders in said cause Docket No. 1499 and are proceeding

to take testimony against the petitioner in said cause Docket No. 1499 and are proceeding to permit William E. Humphrey, a respondent Commissioner charged with prejudice, to participate in said proceedings without denial of or announcement of decision on the questions of prejudice,

And whereas by such actions the respondents may conclude the cause Docket No. 1499 before this court may pass upon and decide the prayer for a writ of mandamus requiring the respondents to pass upon and announce decision on questions of prejudice before taking further action in said cause,

Therefore, you, Federal Trade Commission and William E. Humphrey, C. W. Hunt, Edgar A. McCulloch and Garland S. Ferguson, Jr., and each of you, and your attorneys, agents, employees and all persons acting under your direction and control are hereby prohibited from taking any other or further action, directly or indirectly in the cause known as Federal Trade Commission Docket No. 1499 prior to final decision by this court in this cause, and you are required to maintain said proceeding Docket No. 1499 in the same status as at the time of the service of the rule to show cause why a writ of mandamus should not issue as

81 prayed in the original petition filed herein, and particularly you are prohibited from proceeding with the taking of testimony on, to wit, the 12th day of February, 1929, or at any other time, and from proceeding to issue orders, or do or cause to be done any other act in said Docket No. 1499 until final decision in this cause.

Witness the Honorable Walter I. McCoy, Chief Justice of the Supreme Court of the District of Columbia, the 9th day of February, A. D. 1929.

[SEAL.]

FRANK E. CUNNINGHAM,

Clerk Supreme Court, District of Columbia.

ALF G. BUHRMAN,

Asst. Clerk.

Let the above writ issue.

JENNINGS BAILEY,

Justice.

Marshal's Return.

Served a copy of the within writ of Prohibition on Federal Trade Commission by Otis B. Johnson, Secty., per-

sonally Feby. 9, 1929; Wm. E. Humphrey personally Feby. 11, 1929; C. W. Hunt personally Feby. 9, 1929; Edgar A. McCulloch personally Feby. 9, 1929, and Garland S. Ferguson, Jr., personally Feby. 11, 1929.

EDGAR C. SNYDER,
U. S. Marshal in and for the Dist. of Columbia,
By HARRY C. ALLEN,
Deputy U. S. Marshal.
K.

82 *Motion to Quash Writ of Prohibition.*

Filed February 27, 1929.

* * * * * *

To the Honorable the Justices of the Supreme Court of
the District of Columbia:

Come now the respondents herein and respectfully move that the writ of prohibition issued in this cause, on the 9th day of February, 1929, be quashed, and for grounds for this motion present and show to the Court the following, to-wit:

1. That respondent, Federal Trade Commission, is by law an administrative body or tribunal, vested with administrative powers and functions only, vested with no judicial powers or functions, and exercising none. Wherefore, this court is without jurisdiction or rightful power to issue a writ of prohibition to or against respondents.

2. That the petition filed in this cause for the issuance of said writ of prohibition does not state a cause of action, does not state facts sufficient to entitle petitioner to the relief asked, does not state facts sufficient to entitle petitioner to the issuance of the certain writ of prohibition hereinabove referred to, and does not state any cause of action or ask any relief over which this court has jurisdiction in this cause.

3. That the petition for said writ of prohibition was filed in this cause without notice to respondents or any of them, that at once, without notice to respondents or any of them, upon said petition alone without any other act or thing intervening, this court issued said writ of prohibition and caused the same to be served upon respondents.

83 4. That no facts are and no fact is alleged in the petition for writ of prohibition filed in this cause, tending to show, or from which it can be inferred, that respondent, Federal Trade Commission, does not have full lawful jurisdiction of said proceedings, to-wit, said Docket No. 1499, and over the parties thereto, the subject matter thereof, and of every act and thing done in said cause by respondents or any of them, or which respondents herein are alleged to threaten or purpose to do.

5. That it affirmatively appears from the allegations of the said petition filed herein, that respondent, Federal Trade Commission, has full and lawful jurisdiction over said proceedings, Docket No. 1499, over the subject matter thereof and the parties thereto, and over every act or thing done therein by respondents, or which respondents are alleged to threaten or purpose to do.

ROBERT E. HEALY,

Chief Counsel.

ADRIEN F. BUSICK,

Assistant Chief Counsel,

MARTIN A. MORRISON,

Attorney,

Attorneys for Respondent.

To Matthew E. O'Brien, Esq.,

Matthew H. O'Brien, Esq.,

Attorneys for Petitioner:

Take notice that the foregoing motion to quash the writ of prohibition heretofore issued in this case will be called to the attention of the Court on the 8th day of March, 1929, or as soon thereafter as counsel may be heard.

ROBERT E. HEALY,

Chief Counsel,

ADRIEN F. BUSICK,

Assistant Chief Counsel,

MARTIN A. MORRISON,

Attorney,

Attorneys for Respondents.

84 Service of copy of foregoing motion and notice acknowledged this 27th day of February, 1929.

MATTHEW H. O'BRIEN,

Attorney for Petitioner.

Motion for Prior Determination of Questions of Law.

Filed March 18, 1929.

* * * * *

Come now the Respondents in the above-entitled cause, by their counsel, and respectfully show to this Honorable Court that, in their amended answer herein to the petition for writ of mandamus filed by Petitioner, they pleaded defenses in point of law arising upon the face of the said petition, as follows:

(1) It appears upon the face of the petition herein that petitioner has filed in said case, Docket No. 1499, a certain affidavit of prejudice, a certain supplemental affidavit of prejudice, and certain affidavits in aid thereof; that the Commission has given the same consideration and has not come to any conclusion as to the merits thereof; that, in the due exercise of its discretion, the Commission has postponed the consideration thereof until the final hearing of the cases, leaving the same open to further consideration and such subsequent action thereon as the Commission may, in its sound discretion, deem to be proper.

(2) The statute creating the Commission and defining its powers makes no provision for the filing of an affidavit of prejudice as against a member or members of the Commission or for a method of disqualifying a Commissioner to act in a given case because of prejudice. The Commission, by such research as it has thus far been able to make, 85 has found no statutory or other authority of law for the filing of such affidavits, or for any action thereon by the commission, and knows of no law creating or defining the rights of petitioner in that behalf or the powers and duties of the commission in the premises. The commission has therefore, postponed consideration of said affidavits until the final hearing of the case, to the end that final action may be taken in the light of any additional knowledge of law or fact that may come to the commission.

(3) The mandatory clause of the petition and rule and of the proposed writ herein is so framed as to incorporate and constitute a decree of injunction, enjoining respondents;

(a) From taking any action in the case, Docket No. 540, referred to in the petition.

(b) From taking any action in the case, Docket No. 1499, referred to in the complaint.

(c) From issuing a complaint against the petitioner upon the certain application now pending before the commission as alleged in the complaint.

This pending petition is an action at law, filed and docketed as such, and on no facts alleged or that might be alleged, is petitioner entitled to such a decree herein; and, is, therefore, entitled to no relief herein.

(4) The mandatory clause of the petition and rule and of the proposed writ herein is so framed as to incorporate and constitute a decree by this court vacating and setting aside the action of the commission, taken in the due exercise of the discretion vested in it by law, in fixing the time for the consideration of the certain affidavits of prejudice referred to in the petition herein. Upon no facts alleged, or that might be alleged, is petitioner entitled to a

86 writ of mandamus for the accomplishment of such purpose or to reverse any decision of the commission; and the petitioner is, therefore, entitled to no writ of mandamus herein.

(5) The mandatory clause of the petition and rule and of the proposed writ herein is so framed as to incorporate and constitute a decree enjoining the commission from taking any action in the case, Docket No. 1499, before it shall rule on the pending affidavits of prejudice, while the petition affirmatively shows that, by the action of the commission already taken, such affidavits may not be taken up for consideration until the final hearing of the case, or unless and until the order of the commission postponing the consideration of the affidavits shall have been set aside by the commission, or shall have been otherwise vacated or set aside.

(6) The mandatory clause of the petition and rule and of the proposed writ herein is so framed as to incorporate and constitute a decree enjoining the commission from taking any action in any matter in which the said company, to-wit: the petitioner herein, is a party or has an interest. Under no facts alleged in the petition herein, or that might have been alleged in such petition, is petitioner entitled to

have this court issue a writ of mandamus in this case incorporating and constituting such decree of injunction; and, therefore, the petition herein does not state facts sufficient to constitute a cause of action herein or to entitle petitioner to the issuance of a writ of mandamus in this proceeding.

(7) The petition herein does not allege a refusal by respondents to assume jurisdiction of, consider, or
87 pass upon, the certain affidavits of prejudice referred to in the petition herein and in the mandatory clause of the proposed writ of mandamus herein, or of any of said affidavits; and the petition herein does not, therefore, state facts sufficient to constitute a cause of action or to entitle petitioner to the issuance of a writ of mandamus herein or to any relief in this cause.

(8) The allegations of the petition do not state a case which entitles petitioner to the writ of mandamus as prayed for or to any writ of mandamus.

(9) Any findings of fact the commission might hereafter make and incorporate in its written report in the case, Docket No. 1499, and any order to cease and desist the commission might hereafter make, enter and issue therein, will have no binding force and effect upon the rights of the petitioner, unless and until such findings of fact shall have been accepted and approved by a proper circuit court of appeals upon a petition duly filed therein by the commission to enforce such order to cease and desist, or upon a petition to review such order duly filed by petitioner in such court; and unless and until such court shall affirm such order or modify the same and affirm such order as so modified.

Such court of appeals, upon any such petition, would take original jurisdiction of the case, Docket No. 1499, and of the entire record thereof and would have full original jurisdiction of all questions presented by such record, and full power to decide the same. If it shall appear from the affidavits of prejudice referred to in the petition herein or from any other part or parts of the record in said case that the petitioner has by the commission been denied the benefit of a fair trial of any issue or issues in said case, such
88 court has under the law full jurisdiction, authority and power so to declare and to reject such findings and hold them for naught, and thereupon to vacate

any order to cease and desist the commission may have made, entered or issued thereon.

There is no right expressly given by law for the filing of the affidavits of prejudice alleged in the petition herein, nor is any right, power or duty expressly created by law for action thereon by the commissioners. If petitioner has a right to file such affidavits, and if such affidavits show any impropriety in the continued participation of Commissioner Humphrey in the consideration of, and action by the Commission upon, said case, Docket No. 1499, and if the Commission shall hereafter decide adversely to the petitioner upon said affidavits and permit said Humphrey to continue to act as such in said case, and if the commission shall hereafter make adverse findings of fact in said case against petitioner, and shall thereon make, return, enter and serve upon petitioner an order to cease and desist; then, and in that event, the statute expressly gives to petitioner, a full, adequate, and efficient remedy upon the petition of the commission to enforce such order to cease and desist, and also upon the petitioner's petition to review such order in the manner above set forth. Wherefore, the petition herein does not state facts sufficient to constitute a cause of action, or to entitle petitioner to the issuance of a writ of mandamus herein, or to any relief herein.

Wherefore the Respondents herein, Federal Trade Commission et al., pray this Honorable Court to separately
89 hear and dispose of their said defenses before the
final hearing in this case, and to dismiss this petition as to these Respondents.

ROBERT E. HEALY,

Chief Counsel, Federal Trade Commission,

ADRIEN F. BUSICK,

Assistant Chief Counsel,

MARTIN A. MORRISON,

Attorneys for Respondents.

To Matthew E. O'Brien, Esq., Matthew H. O'Brien, Esq.,
Attorneys for Petitioner:

Please take notice that the foregoing motion for prior determination of questions of law will be called to the at-

tention of the Court on the 22nd day of March, 1929, or as soon thereafter as counsel may be heard.

ROBERT E. HEALY,
Chief Counsel, Federal Trade Commission,
ADRIEN F. BUSICK,
Assistant Chief Counsel,
MARTIN A. MORRISON,
Attorneys for Respondents.

Service of copy of foregoing motion and notice acknowledged this 18th day of March, 1929.

MATTHEW E. O'BRIEN,
Per S. M.,
MATTHEW H. O'BRIEN,
Per S. M.,
Attorneys for Petitioner.

Supreme Court of the District of Columbia.

Friday, May 17th, 1929.

Session resumed pursuant to adjournment, Hon. William Hitz, Justice, presiding.

* * * * *

This cause came on heretofore for hearing upon
90 the "Motion for Prior Determination of Questions
of Law," and all other the pleadings and proceedings
herein and with acquiescence of attorney of record for the
respective parties hereto, the above designated motion was
by the court treated as a demurrer to the petition and
after argument thereon, submitted to the court.

Upon consideration whereof, it is ordered that said motion-demurrer be, and the same is hereby sustained. Wherefore, it is adjudged and ordered, that the rule to show cause issued herein be, and the same is hereby discharged, the writ of prohibition issued on the 9th day of February 1929, quashed and held for naught and the petition filed June 30th 1928, dismissed. Further it is considered that petitioner take nothing by this action and that respondents recover of petitioner their costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing, the petitioner, by its said attorneys, in open court, notes an appeal to the Court of Appeals of

the District of Columbia; whereupon, the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars with the clerk in lieu thereof.

Memorandum.

June 10, 1929.—\$50 deposited by O'Brien in lieu of bond.

91

Designation of Record.

Filed June 25, 1929.

* * * * *

The Clerk will please prepare a transcript of record on appeal to the Court of Appeals of the District of Columbia in the above entitled cause, including therein the following:

1. The petition for writ of mandamus.
2. The rule to show cause.
3. The petition for writ of prohibition.
4. The writ of prohibition.
5. The motion to quash writ of prohibition.
6. The demurrer to petition for writ of mandamus. (Motion for prior determination of questions of law.)
7. The minute entry of May 17, 1929.
8. The docket entries.
9. The Assignment of Errors.
10. This Designation.

MATTHEW E. O'BRIEN,
MATTHEW H. O'BRIEN,
Attorneys for Petitioner.

Service of copy of above designation is hereby acknowledged to have been made this 25th day of June, 1929.

ADRIEN T. BUSICK,
Attorney for Respondents.

92

Additional Designation of Record.

Filed July 1, 1929.

* * * * *

The Clerk in preparing the transcript of record on appeal to the Court of Appeals of the District of Columbia

in the above entitled cause will please include, in addition to the papers covered by the Designation of Record filed by the Petitioner on the 25th day of June, 1929, the following:
Amended answer and return and Exhibit A.

ROBT. E. HEALY,
ADRIEN F. BUSICK,
Attorneys for Respondents.

Service of copy of the above designation is hereby acknowledged this 1st day of July, 1929.

MATTHEW H. O'BRIEN,
MATTHEW E. O'BRIEN,
Per S. M.,
Attorneys for Petitioner.

93

Assignment of Errors.

Filed Aug. 17, 1929.

* * * * *

1. The Court erred in determining the case on demurrer to the petition for writ of mandamus.

2. The Court erred in sustaining the demurrer, entitled "Motion for Prior Determination of Questions of Law".

3. The Court erred in dismissing the petition for writ of mandamus.

4. The Court erred in deciding that the petitioner was not entitled to the issuance of the writ of mandamus as prayed to compel announcement by the respondents of their decision on certain petitions in the form of affidavits of prejudice against the respondent Humphrey.

5. The Court erred in discharging the rule to show cause why writ of mandamus should not issue.

6. The Court erred in holding that upon allegations that affidavits charging prejudice on the part of one of the respondents had been filed in a proceeding before the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, and that motions praying for decision on said question of prejudice had been filed, and that no denial had been made of charges of prejudice or of the facts on which said charges are based, and that the Federal Trade Commission had announced that it had fully con-

sidered said charges and was fully advised thereon, but had refused to publish its decision, the petitioner was not entitled to the issuance of a writ of mandamus as prayed

herein to compel announcement of the decision of the
94 Federal Trade Commission on said questions of prejudice before further proceedings are had before the Federal Trade Commission with said prejudiced member participating in deliberations and decisions on matters affecting the petitioner.

7. The Court erred in quashing the writ of prohibition.

8. The Court erred in deciding that the petitioner was not entitled to any relief in the premises.

MATTHEW E. O'BRIEN,
MATTHEW H. O'BRIEN,
Attorneys for the Petitioner.

Service of copy acknowledged this 17th day of August, 1929.

W. T. KELLY,
Of Counsel for Defendants.
E. W. B.

(Here follows photo. of docket entries, marked page 95.)

96 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 95, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 75648 at Law, wherein Royal Baking Powder Company, a corporation, is Petitioner and Federal Trade Commission, et al. are Respondents, as the same remains upon the files and of record in said Court.

No. 75648 SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PARTIES.	ACTION.	PLAINTIFF'S ATTORNEY.	COSTS.
ROYAL BAKING POWDER COMPANY, a corporation		Matthew E.O'Brien Attorney, Matthew H.O'Brien Marshal,	
vs.	Mandamus		
FEDERAL TRADE COMMISSION, WILLIAM E. HUMPHREY, C. W. HUNT, ABRAM F. MYERS, EDGAR A. McCULLOUGH, and GARLAND L. FERGUSON, Jr., Commissioners.		DEFENDANT'S ATTORNEY. A. F. Busick M. A. Morrison	Clerk, Witnesses, Depositions, Examiner, xxxx Mun. Ct.

DATE.	PROCEEDINGS.	DEPOSITS.	CLERK'S COSTS.
1928 . June 30	Deposit toward costs by O'Brien	10	
" " 30	Petition & appearance filed		
" " 30	Respondents ordered to show cause by July 12" 1928 why prayers of petition should not be granted (M 79 p 301)		
" " 30	Rules (6) certified & issued		
" July 12	Rule to show cause ret'd served defts 1, 4, 5 June 30/28 deft 2 July 5/28 other defts not found		
" " "	Appearance Busick et al for Respts, order filed		
" " "	Answer of respondents & exhibit A: & acceptance of service filed		
" " 13	Motion to strike respondents answer & return, notice and acknowledgment filed		
" " 12	Time to traverse answers extended 10 days (M 79 p 215)		
" " 16	Mo. to strike return & answers granted (M 79 p 320) 10 days to file amended return & answers		
" " 25	Amended answer & return & Ex. A, & ack of service filed		
" " 27	Rule ret'd served		
" " 26	Petitioner's time to plead or traverse respondents answer extended to August 6, 1928, inclusive (M 79 p 331)		
" Aug 6	Mo. to strike amended answer & return filed		
1929 Feb 9	Petition for writ of Prohibition "		
" " "	Writ of Prohibition ordered to issue by Justice Bailey		
" " "	Writ of Prohibition (10) & copies 6 petition issued		
" " 23	Mo. to strike out amended answer & return overruled (M 79 p 473)		
" " 27	Mo of defendant to quash writ of prohibition & notice (not acted on-new mo. filed)		
" Mch 9	Mo of defendant to quash writ of prohibition & notice		
" " 11	Mo. to strike out parts of Amended Answer and Return filed		
" " "	Mo. for issuance of Rule to show cause "		
" " 12	Writ of Prohibition ret'd served		
" " 14	Notice of hearing Mch 22/29 & Ack. of service "		
" " 18	Motion of defts for prior determination of questions of law & Notice filed		
" " 18	Motion of Mch 11/29, for issuance of Rule withdrawn (M 79 p 486)		
" May 17	Rule discharged and petition dismissed with costs to petitioner appeal noted undertaking for costs fixed at \$100.00 or deposit of \$50.00, &c. (M 80 p 18)		
" June 10	\$50. deposited by O'Brien in lieu of bond	50	
" " "	Deposit on appeal by "	5	5
" " 25	Designation of Record filed		
" July 1	Counter Designation of record filed		
" Aug 17	Assignment of Errors filed		

No. 5030
Royal Baking Powder Company, a Corporation, Appellant,

vs.

Federal Trade Commission, and William E. Humphrey, C. W. Hunt, et al.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of August, 1929.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,

Clerk,

By CHAS. B. COFLIN,

Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5030. Royal Baking Powder Company, a corporation, appellant, vs. Federal Trade Commission and William E. Humphrey, C. M. Hunt, et al. Court of Appeals, District of Columbia. Filed Aug. 19, 1929. Henry W. Hodges, Clerk.

(9695)